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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 222

**ILLINOIS CENTRAL RAILROAD COMPANY,
APPELLANT,**

vs.

STATE OF MINNESOTA

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

FILED JULY 24, 1939.

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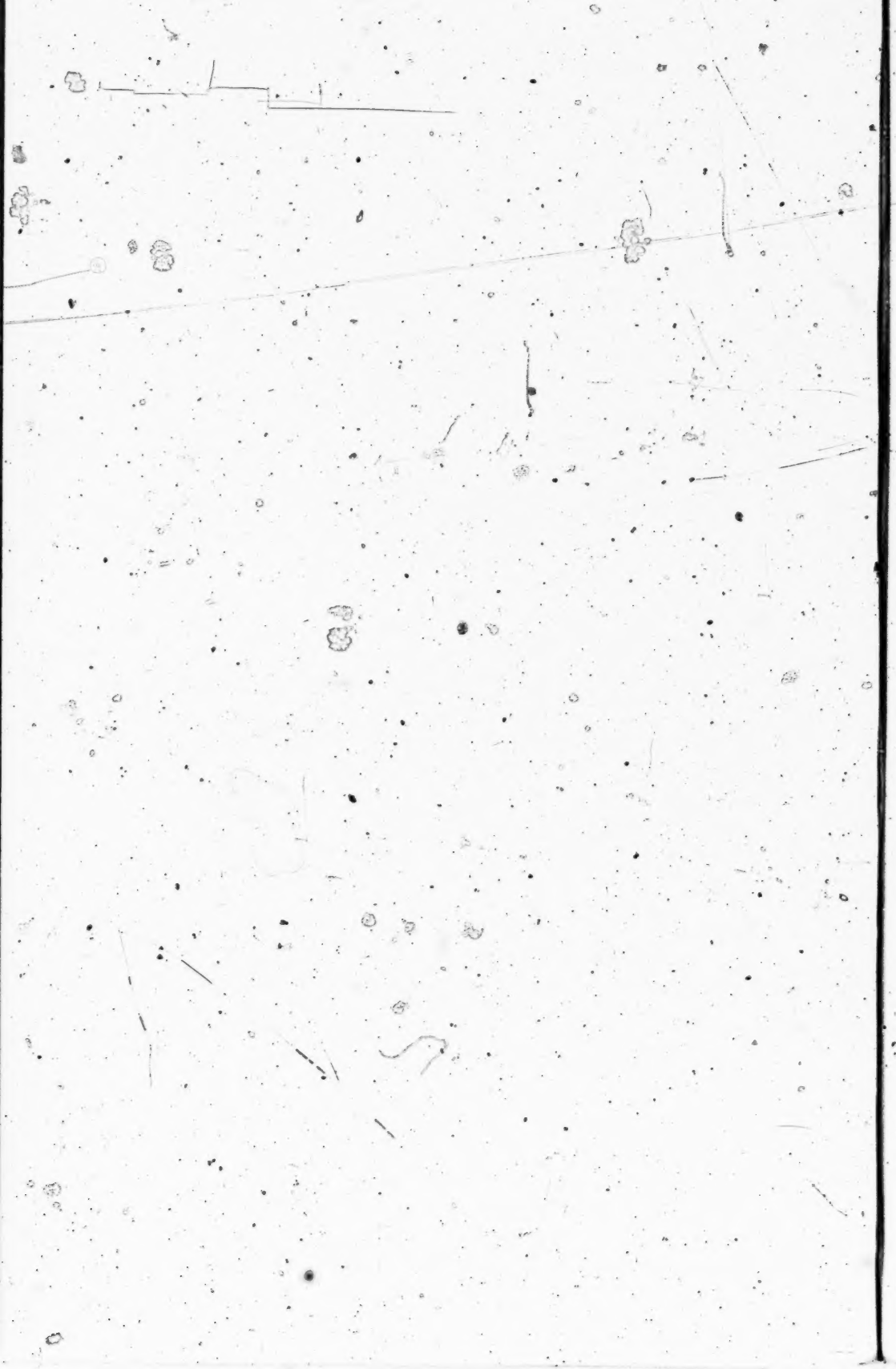
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[fol. 1]

**IN DISTRICT COURT, COUNTY OF RAMSEY, SECOND
JUDICIAL DISTRICT**

STATE OF MINNESOTA, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation,
Defendant

COMPLAINT—Filed March 15, 1934

The plaintiff for its cause of action against the defendant herein respectfully shows to the court and alleges:

I

That during all the time herein mentioned defendant has been, and now is, a corporation, and during all of said time it owned and operated certain lines of railroad within the State of Minnesota as a railroad company in the usual manner as a common carrier of freight and passengers.

[fol. 2]

II

That defendant failed and neglected to furnish the State of Minnesota true and complete returns of all its gross earnings, during the years hereinafter set out, as a railroad company operating a railroad as a common carrier within the State of Minnesota as provided by law for purposes of taxation in that it failed and neglected to report, and arbitrarily deducted from its gross earnings before reporting the same, the sums hereinafter set out, in its statements thereof filed with the Minnesota Tax Commission during the years hereinafter set out, the deducted sums, hereinafter set out, consisting of earnings from hire of equipment. Each of said deducted sums of omitted earnings were earnings of the defendant as a railroad company in the operation of its railroad in the State of Minnesota during the years hereinafter set out. That the years, and omitted earnings thereof, are as follows:

Year
1922
1923

Omitted Earnings
\$303,547.11
370,455.68

Year	Omitted Earnings
1924	240,482.55
1925	192,980.38
1926	163,782.76
1927	184,096.42
1928	170,625.21
1929	168,517.07

[fol. 3]

III

That the Comptroller of the State of Minnesota discovered the omission of said earnings and, as required by law, filed his report thereof with the Minnesota Tax Commission on or about May 6, 1933.

That immediately thereafter the Minnesota Tax Commission assessed said omitted earnings for taxes and penalties and fixed the amount of such taxes upon the earnings omitted from the defendant's reports, for the years aforesaid, at \$89,724.36, together with statutory penalties and interest thereon to May 19, 1933, amounting to \$93,026.94, making the total amount of taxes, penalties and interest to that date \$182,751.30, and made entry thereof in its records, and on May 19, 1933, certified said taxes, penalties and interest in the sum of \$182,751.30 to the State Auditor.

That on May 19, 1933, the State Auditor made his draft No. 78608 upon the defendant for the full amount of said taxes, penalties and interest so certified, to-wit: \$182,751.30, and placed it in the hands of the State Treasurer for collection.

That the State Treasurer immediately notified the defendant thereof and demanded payment of said draft, but no part of said draft, nor the taxes, penalties and interest included therein, have been paid. That on June 22, 1933, the State Treasurer delivered said unpaid draft to the Attorney General for collection.

[fol. 4] Wherefore, plaintiff prays judgment against the defendant in the sum of \$182,751.30, with interest as provided by law until paid, together with its costs and disbursements therein.

Harry H. Peterson, Attorney General, Harry W. Oehler, Deputy Attorney General, Attorneys for Plaintiff, 102 State Capitol, St. Paul, Minn.

(Verified.)

IN DISTRICT COURT OF RAMSEY COUNTY

AMENDED AND SUBSTITUTED ANSWER OF ILLINOIS CENTRAL RAILROAD COMPANY—Filed Oct. 24, 1935

Comes Now, The defendant, Illinois Central Railroad Company, and for answer to the complaint of the State of Minnesota alleges:

I.

It admits that it is now and during the time referred to in plaintiff's complaint, was a corporation operating as agent of the Dubuque and Sioux City Railroad Company, a line of railroad in the State of Minnesota, in extent about 30.15 miles, through the Counties of Mower, Freeborn and Rock.

[fol. 5]

II

Defendant specifically denies that it has failed or neglected to furnish the State of Minnesota true and complete returns of all of its gross earnings during the years 1922-1929, inclusive, as required by the law of Minnesota for purposes of taxation, and denies that it has deducted from its reports of gross earnings any sums which should have been included therein; it denies that its principal, the Dubuque and Sioux City Railroad Company, has failed to make complete returns or pay its full taxes on gross earnings during said years.

III

Defendant denies each and every material allegation of plaintiff's complaint not herein specifically admitted.

IV

The defendant, Illinois Central Railroad Company, denies that it owns, or operates for itself, any line or lines of railroad in the State of Minnesota and denies that it did own or operate during the years in question, to-wit: 1922-1929, inclusive, any railroad in said state.

It alleges that it did operate as the agent of the Dubuque and Sioux City Railroad Company, the owner thereof, and not otherwise, 18.75 miles of road between Lyle, Minnesota and Glenville, Minnesota; and 11.40 miles of railroad through Rock County in said state. That said mileage in Minne-

[fol. 6] sota is a part of the total mileage of the Dubuque and Sioux City Railroad Company, a corporation organized and existing under the laws of the State of Iowa, which owns 760.89 miles of railroad, most of which, with the exception of the 30.15 miles in the State of Minnesota, is located in the State of Iowa.

That a copy of the contract under which this defendant operates said railroad is attached hereto, marked Exhibit "A", and by reference made a part hereof. That under the express provisions of said contract this defendant during the years in question neither had nor was it entitled to any earnings, gross or otherwise, derived from the operation of the Dubuque and Sioux City Railroad; that after the payment of all expenses of operation, the earnings, if any, under the terms of said contract Exhibit "A" are and were payable to, and the property of, the Dubuque and Sioux City Railroad Company; that in no event and under no circumstances does or did the Illinois Central Railroad Company participate in such earnings, either gross or net; that during the years 1922-1929, inclusive, there were no car hire rentals or earnings, either gross or net, due or paid to the Dubuque and Sioux City Railroad Company or the Illinois Central Railroad Company, as operating agent of said company.

That the Dubuque and Sioux City Railroad Company does not own any freight cars or other equipment on which car rentals are paid; that the equipment it uses in the [fol. 7] operation of its road is leased from the Illinois Central Railroad Company, for which it pays an agreed rental.

V

The defendant, Illinois Central Railroad Company, alleges that it is compelled under the Interstate Commerce Act to furnish, and that it did during the years in question furnish, its cars for the transportation of freight which moved to and over the lines of other railroad companies; that under the contracts between the Illinois Central Railroad Company and the other railroad companies with which it interchanged cars, no charge in money was made for the use of said cars and no accounting for any difference or payment for any excess was made except upon an entire system basis; that said contracts under which said cars were interchanged, pursuant to the Act of Congress known as the

Interstate Commerce Act and the amendments thereto, were approved by the Interstate Commerce Commission and became the only proper and legal method for accounting between said companies.

VI

Defendant alleges that such exchange of cars is a mere interchange of service and does not produce or constitute gross earnings or revenue in the operation of the railroad, within the provisions of the Minnesota statute.

VII

[fol. 8] That the contracts between this defendant and the other railroad companies for the exchange of car equipment was entered into prior to the enactment of the statute of Minnesota under which it is sought to collect such gross income taxes; that under the terms of said contracts no charges or payments are made except for an excess balance of car service upon an accounting for the use of said cars upon the entire systems of said companies and not upon any accounting based upon the use of said cars in the State of Minnesota. That any law of the State of Minnesota providing for another or different method of accounting, or requiring this defendant to account as for gross earnings for car rentals in the state and not upon a basis of any balance due upon the total exchange or use of cars upon its system as a whole, is in violation of the provisions of the Constitution of the United States and in particular in contravention of the provisions of Section X of Article I providing that "no state shall pass any law impairing the obligation of contracts."

VIII

That if the statute of Minnesota, upon which plaintiff relies for the imposition of a gross income tax on car rentals, is construed as contended for by plaintiff, to permit the imposition and collection of the tax in the amount claimed by the State of Minnesota in this action, the im-[fol. 9] position and collection of such tax is in violation of the provisions of Section VIII of Article I of the Constitution of the United States giving to Congress the power to regulate commerce among the several states, in that it is an unreasonable, arbitrary and unwarranted burden on said commerce.

IX

That the imposition of the tax sought in this action amounts to double taxation without authorization by the constitution or statutes of the State of Minnesota and in violation thereof. That it is contrary to the public policy of said state as pronounced in numerous decisions of its Supreme Court. That it results in the collection by the State of Minnesota of a gross income tax upon alleged car rentals, (which are not in effect income or earnings, and which, if collectible at all, may only be collected after striking a system balance, as provided by contract between the carriers and by the rules of the Interstate Commerce Commission promulgated pursuant to the Interstate Commerce Act) and also on the earnings from said cars, i. e. the freight charges which are in fact, the only earnings from their operation, since the car rental per diem credits offset each other and the excess represents cost of maintenance and depreciation only.

That the system of accounting sought to be enforced by the State of Minnesota, if enforced, would prevent other states from taxing their fair proportion of gross income arising from car rentals.

[fol. 10].

X

That the imposition of said tax and the construction of the Minnesota statute under which it is sought to be collected is in violation of the Fourteenth Amendment to the Constitution of the United States; is the taking of defendant's property without due process of law and the denial to defendant the equal protection of the law; that said gross earnings tax is in lieu of a property tax and is a tax on property; that the proposed additional tax on the alleged rental of defendant's cars is a double tax on such cars which are already taxed in the hands of the users, thereby discriminating in the taxation of cars which are "rented" as compared with cars which are used. Further, the method of calculating the proposed additional tax is such that, by taking the alleged net per diem, balancing debits and credits growing out of alleged per diem earnings in Minnesota, the state's formula operates in such a manner as to tax the alleged earnings from the rentals of defendant's cars, whereas all of the cars of foreign roads whose

cars move in Minnesota and most of the cars of other owners are not similarly taxed, thereby depriving defendant of the equal protection of the laws guaranteed under the Fourteenth Amendment of the Constitution of the United States.

Said tax and the statute under which it is attempted to be levied by the State of Minnesota is arbitrary, unreasonable, grossly unequal and inequitable in that, as attempted to be applied to the operation of this defendant during the [fol. 11] years in question, it results in the imposition of a tax grossly disproportionate to the business transacted by this defendant in the State of Minnesota as compared with the business of other roads operating therein; that the construction of said statute and its application according to the principles involved in the formula under which this tax is assessed, results in the imposition of a tax increasingly large as the business resulting from such operation decreases in amount; so that the less business done by a railroad operating in said state and the shorter the mileage of track of such railroad in said state, the greater is the tax imposed by the state; thereby accomplishing a scheme by which railroad companies located mainly out of the state but having a small amount of property therein, are subject to taxation, which is in effect taxing values outside of the state in violation of the due process clause of the Federal Constitution.

XI

That for many years the State of Minnesota, acting through its duly authorized Tax Commission and pursuant to statutory authority, has furnished forms for the return by railroad carriers operating in said state of their gross earnings. In exact accordance with the provisions of said forms furnished by the State of Minnesota, and in compliance with the instructions of the Tax Commission of said state, all of the railroads operating therein, and the Illinois Central Railroad Company as the agent of the Dubuque and Sioux City Railroad Company have and did [fol. 12] during the years in question, to-wit 1922-1929, inclusive, make and file their returns of gross earnings.

That this defendant, the Illinois Central Railroad Company, operating as the agent of the Dubuque and Sioux City Railroad Company, made its return and paid its gross earnings tax to the State of Minnesota in strict and full

compliance with the instructions and requirements of said Tax Commission.

That during the year 1931 the duly appointed, qualified and acting corporate examiners of the State of Minnesota audited the defendant's accounts and its returns for said years 1921-1929, inclusive, and the Tax Commission, pursuant to said audit, rendered a bill for omitted taxes in the sum of \$119.13, penalty \$11.91, interest \$29.54, total \$160.58, which amount was paid by defendant and accepted by the State of Minnesota in full payment and satisfaction of the alleged balance due on its gross earnings tax for said years.

That, relying upon the instructions from the Tax Commission of the State of Minnesota and the forms furnished by it for the making of its returns, upon the audit made by the corporate examiners of said state and upon the rendition and payment of the bill for the alleged additional taxes, this defendant (and in compliance with the rules of the Interstate Commerce Commission made pursuant to the Interstate Commerce Act) destroyed its old records, including those of its car accountants, which had been fully [fol. 13] examined by the corporate examiners and those of the Tax Commission of the State of Minnesota during said years, so that now it is unable to produce said records and show with complete accuracy the details of its interchange of cars with other roads. That other lines of road operating in Minnesota have likewise in reliance upon the aforesaid acts of the State of Minnesota, and in accordance with their usual custom and practice, have destroyed their records and are unable to produce the same at this time so that this defendant may show with exactness the interchange of cars between said roads in the State of Minnesota.

Wherefore, the State of Minnesota, plaintiff herein, is now estopped from alleging that there accrued any other or additional taxes during the years in question or that any additional sum is now due the state.

Illinois Central Railroad Company, By Doherty,
Rumble & Butler, 1st Nat'l Bk. Bldg., St. Paul,
Minn., R. C. Beckett, 135 E. 11th Place, Chicago, Ill.,
Chas. A. Helsell, 135 E. 11th Place, Chicago, Ill.

(Allowed June 18, 1935.)

[fol. 14] IN DISTRICT COURT OF RAMSEY COUNTY

REPLY—Filed March 15, 1934

Now comes the plaintiff above named, and for its reply to the answer of the defendant, denies each and every allegation, statement, matter and thing contained in said answer, except so far as the same may admit the allegations set forth in plaintiff's complaint.

Wherefore, plaintiff demands judgment as prayed for, in its complaint herein.

Harry H. Peterson, Attorney General, Harry W. Oehler, Deputy Attorney General, Attorneys for Plaintiff, 102 State Capitol, St. Paul, Minnesota.

[fol. 15] IN DISTRICT COURT OF RAMSEY COUNTY

Statement of Evidence—Filed Jan. 19, 1937

The above entitled action duly came on for hearing before the Honorable James C. Michael, without a jury, on Monday, June 17, 1935, and continued through Tuesday, June 18, 1935.

APPEARANCES

Harry H. Peterson, Attorney General, and Harry W. Oehler, Deputy Attorney General, of the State of Minnesota, Plaintiff.

Doherty, Rumble & Butler and C. A. Helsell and R. C. Beckett, Attorneys, for the Defendant.

COLLOQUY

Mr. Helsell: We ask leave at this time to file an amended and substituted answer, copy of which was served upon counsel for the State last week. The answer elaborates the one constituting objections to the tax which have already been raised. Possibly it is subject to the criticism that one new defense is raised: the agency contract under which the road is operated, but I am sure counsel for the state will agree that he is not taken by surprise for the reason that we have discussed it with him, for the last two months, and he has been furnished with a copy of the agency contract and citations of our authority in support of that. He is

aware of that particular part of the answer which is not specially pleaded before.

Mr. Oehler: The State objects at this time coming as it does on the morning of the trial and for the further reason [fol. 16] that the answer itself is replete with conclusions of law and considerable evidence. That is my prime objection to it. I think the court might well deny the motion at this time.

The Court: Conclusions of law and pleading of evidence couldn't hurt you any, can it?

Mr. Oehler: It's a matter of more or less sustaining the allegations.

The Court: I think the amendment will be allowed. Has the proposed amendment been filed?

Mr. Oehler: It appears not to be filed yet. Counsel has the original.

The Court: Leave it and the clerk will take care of it.

Mr. Helsell: The answer now on file refers to an exhibit which is a contract between the Illinois Central and Dubuque and Sioux City R. R. Co. There is no copy of that exhibit attached to the answer, but counsel has for some time been furnished with the copy of it and there will be an exhibit introduced in evidence.

The Court: Will counsel briefly tell me the questions of law so that I may better appreciate the evidence.

Mr. Oehler opens to the court on behalf of the Plaintiff.

Plaintiff State's Exhibit A marked.

Mr. Oehler: Plaintiff offers in evidence State's Exhibit A, being a certified copy of the official entries of the Minnesota Tax Commission fixing the amount of the amended [fol. 17] gross earnings and tax thereon and accruing penalties all set out on the complaint herein.

Mr. Helsell: Defendant objects to it as incompetent, irrelevant and immaterial and for the further and more specific reason that the tax attempted to be levied is void for each and all of the reasons set forth in the answer.

Mr. Oehler: May I call the court's attention to, I think it is Section 2237, providing for a certified copy of that document to be submitted and I offer that in evidence. You don't object to the form?

Mr. Helsell: I think counsel's position is well taken. The exhibit may be received.

Mr. Oehler: The state rests.

Mr. Helsell opens to the court on behalf of the Defendant.

MR. AXEL L. BERGSTROM, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

Mr. Helsell:

Q. Mr. Bergstrom, calling your attention to the exhibit identified by the reporter as Defendant's Exhibit 1, I will ask you to state, if you will, what that is?

Defendant's Exhibit 1 marked.

A. That is a report of the examination of the gross earnings of the Illinois Central R. R. for the years '22 to '29.

[fol. 18] Q. Your name is what?

A. Axel L. Bergstrom.

Q. Where do you live, here in St. Paul?

A. Yes, sir.

Q. Your occupation is what?

A. Corporation examiner for the State.

Q. How long have you been engaged in that work?

A. I have been in the department for going on 19 years and 11 years in corporation work.

Q. Does that work include the examining and auditing of railroad accounts in the making of their returns under the Minnesota gross earnings tax?

A. It does.

Q. And did you, with the assistance of others make an examination of the report of the Dubuque & Sioux City Ry. Co., for the years 1922 to 1929, at the Illinois Central offices?

A. Yes, sir.

Q. The books of that company, you found, are kept in the general offices of the Illinois Central R. R. Co., in Chicago?

A. Yes, sir.

Q. And you and Mr. Varney (?) made an audit of those books?

A. Yes, sir.

Q. The Dubuque & Sioux City Ry. Co. had for those years made its report,—its return to the State of Minnesota?

A. Yes, sir.

Q. And had paid the tax based upon the report,—on the returns?

[fol. 19] A. Yes, sir.

Q. Were you one of those who made the special report which has been identified by the reporter as Exhibit No. 1?

A. Yes, sir.

Q. Referring to that report will you explain to the court what it shows?

A. The summary here, you mean?

Q. That first page to which your attention is called is the summary showing credits and debits for the years 1922 to 1929?

A. That is right.

Q. The first column is?

A. The first column is the rentals from other lines for use of cars.

Q. Showing the total for each of the respective years mentioned?

A. Yes, sir.

Mr. Helsell: If the court please, the returns made by the Dubuque & Sioux City are not on the copy of this exhibit. I will try and find a copy for you.

The Court: Very well.

Q. And in the second column is shown what?

A. The Minnesota proportion.

Q. And the third column is?

A. Payments to other lines for use of cars.

Q. The next column is what?

A. The Minnesota proportion.

Q. And the next to the last column?

A. Receipts in excess of payments.

Q. And the last column?

[fol. 20] A. Is taxes at five per cent.

Q. That is a summary for the respective years 1922 to 1929, inclusive, dividing it on the basis of the so-called State formula. What is that basis?

A. That is—

Q. That is right, is it?

A. That is right.

Q. Let's turn to the next page of the exhibit. Will you explain to the Court what that shows?

A. That shows the year 1922, the Illinois Central's operations in rental from all other lines, confined to Minnesota operations.

Q. When you say Illinois Central operations, you say—assume that it is the operations of that road for the Dubuque & Sioux City Ry. Co.?

A. Yes.

Q. And is a break-down of all the roads in Minnesota showing the receipts and disbursements of those roads for freight car per diem, is that right?

A. That is right.

Q. The first column then contains the names of all the Minnesota roads?

A. Yes, sir.

Q. And the next column shows the rentals from other lines received by the Dubuque & Sioux City, or by the Illinois Central, for 1922?

A. Yes, of course that statement is not a correct statement, it's what appears on the exhibit, Mr. Helsell.

Q. It is correct in the light of the plan we know at this time. We won't quarrel about that. I don't wish to bind [fol. 21] you to an admission. The next column is the Minnesota percentage of the loaded car miles?

A. That is right.

Q. That is the Minnesota percentage of the using line, or other lines, is it not?

A. That is true.

Q. Take for example the Great Northern, where is that?

A. Here it is. (pointing out an exhibit).

Q. What is the percentage of the loaded freight car miles as shown by this tabulation?

A. Thirty-six and forty-eight hundredths.

Q. In Minnesota?

A. In Minnesota.

Q. And you have applied that percentage to the first column to determine the third column, is that right?

A. That is right.

Q. Now, then, the payment to other lines is shown in the fourth column?

A. That is right.

Q. Taking for illustration the Great Northern case again. The payment by the Illinois Central, or Dubuque & Sioux City, to the Great Northern totaled \$149,732.60, is that right?

A. That is right.

Q. Whereas the payment by that line to the Illinois Central, or Dubuque & Sioux City, as the case may be, amounted to \$101,744.37, is that right?

A. That is right.

Q. So that in round numbers the Dubuque & Sioux City [fol. 22] paid to the Great Northern some \$49,000 in excess of the amount received?

A. That is right.

Q. So that while the Dubuque & Sioux City paid \$48,000 more than it received, there is taxed against the Dubuque & Sioux City for those years a certain amount of taxes, are there not?

A. For the entire year including all the lines, you mean?

Q. Well, for this particular road?

A. Just the Great Northern?

Q. Yes, take that.

A. You would have to check regarding that to see that is based on all the totals. The final tax is based on all the totals here. That total is computed on 5 per cent. You would have to separate each road.

Q. Try to apply it now, Mr. Bergstrom to the Great Northern. There would be a taxable balance there?

A. Yes.

Q. Of the payments received by the Dubuque & Sioux City from the Great Northern of \$101,000. The Minnesota proportion of which is thirty-six or thirty-seven thousand plus—

A. That is right.

Mr. Oehler: Object to the use of the Dubuque & Sioux City at this time as it does not conform with the exhibit. It purports to be an examination of the Illinois Central and the Dubuque & Sioux City is not mentioned or referred to thereon.

Mr. Helsell: I am perfectly willing, if the court please to [fol. 23] call it the Illinois Central or Dubuque & Sioux City. Neither party being bound by the name. It is a question of who is doing the operating.

The Court: You are both referring to the same railroad, I suppose.

Q. What was the last question?

(Reads) Of the payments received by the Dubuque & Sioux City from the Great Northern of \$101,000—

A. 36.48 per cent was applied to that amount.

Q. Now of the credits which the Illinois Central R. R. Co.—I call it that for the purpose of satisfying Mr. Oehler—

which were allowed to that company—were but eleven hundredths of one per cent, is that right?

A. That is right.

Q. And that in car day credits, or dollars, as the case may be, amounts to \$164.71. So that the company was permitted an off-set against the applied receipts of \$37,000, but \$164.71, is that right?

A. That is right.

Q. So that it actually paid out more than it received?

A. That is true.

Q. Now, let's refer to the next page, what is that?

A. That is the same set-up for the year 1923.

Q. The same method was used for allocating debits and credits?

A. They were.

Q. And the result shows, using the Great Northern for [fol. 24]) illustration during that year—the Great Northern paid less than it received?

A. You paid less than you received from the Great Northern.

Q. That year?

A. Yes.

Q. About \$29,000?

A. You received more from the Great Northern than you paid to the Great Northern for that year.

Q. That is it?

A. The same percentage that is?

Q. The Great Northern percentage of loaded freight car miles in Minnesota for that year was thirty-four and ninety-two hundredths?

A. That is right.

Q. And the percentage of Illinois Central loaded freight car miles in Minnesota for that year was thirteen hundredths?

A. That is right.

The Court: Thirteen hundredths?

Mr. Helsell: Thirteen hundredths of one per cent.

Q. In 1924, the third page of this exhibit—

A. Is the year 1924.

Q. The Great Northern percentage in that year was thirty-five and twenty-one hundredths per cent of loaded freight car miles charged to the system, and the Illinois Central's twelve hundredths of one per cent?

A. That is right.

Q. That was the percentage used for that year for allocation of the credits which the State claimed under this formula, is that right?

[fol. 25] A. That is right.

Q. The succeeding pages, Mr. Bergstrom, show the percentages for the years 1925, 6, 7, 8 and 9, is that right?

A. That is right.

Q. And the same method of allocating to the State of Minnesota was used in each instance?

A. It was.

Q. And these totals—debits and credits of car days—and interchange of cars between the Illinois Central and the Minnesota roads, those figures were secured from the railroad company and they furnished the figures?

A. Yes, sir.

Q. Does there occur any matters you wish to ask about them?

A. No, sir.

Q. In fact the company has, at all times, actively and whole-heartedly cooperated with your department in furnishing the figures and permitted and authorized their access, have they not?

A. Yes.

Q. And these percentages,—and I refer again to the Great Northern, because their percentage is 36.48 per cent of loaded freight car miles in the year 1922,—what do you mean by the term loaded freight car miles?

A. It means the loaded freight car miles in Minnesota compared to the entire system. The proportion of loaded freight car miles compared to the loaded freight car miles in the entire system.

Q. It is true, is it not, that the per diem credit accrues to [fol. 26] the empty cars as well as the loaded cars?

A. Yes, sir.

Q. And also, the per diem credit accrues on cars standing still on foreign lines as well as those cars which are moving?

A. Yes, sir.

Q. So that the basis for determining this percentage ignores the fact that the per diem credit applies, notwithstanding the fact all of the cars are not loaded?

A. Yes, it consists of revenues—

Q. In applying that formula you have not applied any claims or refunds, have you not?

A. That is true because that was not furnished at the time the statement was set-up.

Q. But the fact remains you did not, have not considered that in that formula?

A. That is true.

Q. And in determining that 36 per cent of the Great Northern loaded freight car miles in Minnesota and that the Illinois Central or Dubuque & Sioux City Ry. Co. must be charged with 36 per cent of the credit while the cars were on the Great Northern, you entirely overlooked the fact that a large volume of the Great Northern business is done in ore cars? Isn't that true?

A. That is true.

Q. You made no allowance for that?

A. None at all. The Great Northern made the allowance in this per cent because they made the set up themselves and we took their figures for that.

[fol. 27] Q. Yes, they gave you all their loaded freight car miles whether they included the ore cars or not—

A. I can't say. I don't know.

Q. But you assumed, Mr. Bergstrom, in making the return—

A. Yes.

Q. That the Great Northern gave you what you asked for. All of the loaded freight car miles on that system?

A. That can be assumed, yes.

Q. You so understood that?

A. At that time, yes.

Q. You weren't in the slightest disposed to question it at that time?

A. They could have verified it. The Great Northern submitted some figures and we didn't know whether they included ore cars or not.

Q. Well, now, was there any question in your mind about the correctness of that figure at that time?

A. Well, to get it verified—

Q. Will you before we finish here?

A. Yes, I will be glad to.

Q. Thank you. The Illinois Central, as you know, has no ore cars, has it?

A. Not to my knowledge, no.

Q. Then, too, there is a large volume of Great Northern business—coal business?

A. There are coal cars used by the Great Northern in its business here in Minnesota.

Q. And it's true, isn't it, that the Illinois Central coal [fol. 28] cars are in use in the transportation of coal on the Great Northern?

A. That is something I couldn't say.

Q. The percentage of 36.48 per cent I find on the first page of—or the second page of Exhibit 1, would be substantially less if the Great Northern ore business were deducted?

A. Yes, sir.

Q. In making your examination of the accounts of the several roads and in the reports of the gross earnings for these eight years you found that there were some alleged omissions or discrepancies in the returns on the part of some of the roads, did you not?

A. Yes, sir.

Q. And those are the smaller roads in the State of Minnesota?

A. The shorter roads.

Q. With one exception, the Milwaukee?

A. Yes, I think the big part of them are short line miles and roads.

Q. The application of your formula resulted in no per diem car rental for the Great Northern or Northern Pacific?

A. No, sir.

Q. And these two roads have some two thousand miles of road in the State?

A. Right.

Q. Each?

A. Yes.

Q. That is right?

A. Yes.

[fol. 29] Q. There are in the State about how many roads?

A. Roads that operate in the State?

Q. Yes.

A. I think we have them here. I've never counted them. I should say 26 or 27 roads in the State.

Q. That are shown on this list, tabulated in Exhibit 1.

A. In round numbers. I don't think the smaller roads are shown.

Q. Now, of these 27 roads the definite figures show, and the tax was found to be due from but only eight?

A. Yes.

Q. What is the fact as to whether or not the application of this formula results in a tax which is correspondingly large or increasingly large as the mileage of that road decreases?

A. —.

Mr. Oehler: Object to that as immaterial.

The Court: The figures talk for themselves. He can answer the question.

Mr. Oehler: Exception.

A. Yes, sir.

Q. So that a road which has a higher percentage of mileage in the state, if the formula were applied, would pay no tax?

A. —

Mr. Oehler: Same objection.

A. That depends, Mr. Helsell—

Q. Let's apply it to our exhibit here. The Great Northern, for example, with 36.48 hundredths per cent of its [fol. 30] loaded freight cars in the state, would pay no tax under this formula?

A. No.

Q. The Illinois Central with but one-tenth of one per cent does pay a substantial tax under the formula?

A. Yes.

Q. Can you tell the court what point the breaking point is—that is, what percentage of its Minnesota mileage, as compared to the system mileage is, where the payment of taxes or non-payment of taxes occurs?

A. It is apparently established there around the 13 per cent point.

Q. So that if a road has more than 13 per cent of its mileage in Minnesota it does not pay a tax under that formula?

A. Under this formula it would seem that 13 per cent would be the amount.

Q. About the basis point?

A. Yes, sir.

Q. As the percentage of mileage decreases below that point the tax would increase?

A. That is true.

Defendant's Exhibit No. 2 marked.

Q. The loaded freight car miles, again taking for the purpose of illustration the Great Northern which for the year 1922 showing a Minnesota percentage of 36 per cent plus, includes the loaded freight car miles on that road of foreign cars—that is cars of roads not operating in Minnesota, does it not?

[fol. 31] A. I don't know. They submitted the figures themselves.

Q. Well, if it was the total loaded freight car miles they would of necessity be included?

A. It should, yes.

Q. The loaded freight car miles of cars of other roads not operating in Minnesota?

A. It should.

Q. So that the percentage with which the Illinois Central is charged, 36 per cent plus, would be substantially reduced if the loaded freight car miles arising from the loaded cars of railroads not operating in Minnesota were deducted? Is that true?

A. That is true.

Q. This claim of the state in this suit is based upon the freight car per diem earnings, you understand that?

A. Yes.

Q. It is based wholly on the freight car per diem earnings?

A. Yes, sir.

Q. A short time ago I asked you whether you, Mr. Bergstrom, or Mr. Varney, after the reports or returns were made by the Dubuque & Sioux City, or Illinois Central for the years 1922 to 1929 inclusive, whether you made such an audit of the books of that company, of those companies in Chicago and you said yes?

A. Yes.

Q. As a result of that audit did you find that any corrections were necessary?

[fol. 32] A. To the best of my memory there were, there was some corrections.

Defendant's Exhibit 3 marked.

Q. Your attention is called to the State Treasurer's receipt marked by the reporter Defendant's Exhibit 3, that apparently is a receipt for the payment of \$160.58. Can you explain to the court what item is covered by that receipt?

A. —

Mr. Oehler: Objected to at this time. The State concedes it is a miscellaneous car rental tax receipt.

Mr. Helsell: It is an alleged balance due for the years resulting from the audit.

Mr. Oehler: I have no objection then. Objection is withdrawn.

A. What constitutes that tax is something I can't say without the records of the examination. It only shows a tax receipt of \$160.58. But there is no claim here as to what—This is only a state treasurer's receipt, you know.

Q. I will call your attention to that part of the exhibit, in the first column, five per cent tax on railroad. Unreported gross earnings. Errors and omissions. Years 1923 to 1929, with penalty and interest? (showing witness.)

A. That is right.

Q. And the tax was \$119.13?

A. Yes.

Q. And penalty \$11.91?

A. Yes.

Q. And interest \$29.54?

[fol. 33] A. Yes.

Q. And the total \$160.58?

A. That is right.

Q. Do you recall—

The Court: What is the date of that receipt?

Mr. Helsell: July 20, 1931.

Q. Do you recall having found such a balance due from the railroad company, at about that time?

A. Well, that's a long time ago Mr. Helsell, but it seems to me there was an amount due.

Q. Do you know whether the amount was paid?

A. Well, the state receipt would indicate what was paid.

Q. Did you, in making that audit or check of the accounts, go through all the books and returns for gross earnings during those years?

A. No, sir, we never attempted that. It would take a long time.

Q. To what extent did you make an audit?

A. We made the audit on percentage and analyze—that is, we also take the different accounts and analyze the per cent for—from—by months and if the per cent runs even we assume that there is no error or mistake within that

period. We make a thorough check of the details in each instance. That is true with all accounts—switching, freight earnings, passenger earnings, all earnings and books of the railroad that reports taxes.

Q. Yes—

A. But to attempt to go into, check every item for the Illinois Central would probably take a year or two.

[fol. 34] Q. That was the character of the audit, check you made of the accounts for these years?

A. That is true.

Q. So far as any inaccuracies or omissions were discovered, that is the result of that check?

A. Yes, sir.

Mr. Oehler: Objected to on the ground it is immaterial, if the court please. There isn't any claim that the witness attempted to ascertain a rental per diem at that time or under any of these examinations.

The Court: It's just a history of what transpired, that's all. I see no objection to it.

Q. I now call your attention, Mr. Bergstrom, to Defendant's Exhibit 2, consisting of 16 parts and ask you to state to the court what they are?

A. That is the return to the Minnesota Tax Commission of the gross earnings of the Dubuque & Sioux City R. R. Co., operated under lease by the Illinois Central Road for the years 1922 to 29 inclusive.

Q. They are the original returns?

A. They are.

Q. Original or a duplicate of the original?

A. —

Mr. Oehler: I have the original in my file, I don't see how those can be the originals.

Q. And they are, I presume, identical with the Illinois Central's?

A. That is true.

Q. It isn't the one filed in the Tax Commission's office?

[fol. 35] A. No.

Q. And they consist of 16 reports, exhibits?

A. Yes, sir.

Q. And who furnished the forms for the making of these reports?

A. The Minnesota Tax Commission,

Q. And that is true in each and all of the forms of these 16 returns, is it not?

A. Yes, sir.

Q. They are uniform?

A. Yes, sir. They may of course. These formulas, you understand are not—We have nothing to do with that. That is strictly an administrative thing. When the report from the State Comptroller's office—

Q. You are one of the examiners in that office. If there is a change in the set-up of the form—

A. That is something they would undoubtedly call to your attention.

Q. You have—All of these forms were prepared, sent out by the Minnesota Tax Commission?

A. Yes, sir.

Mr. Helsell: If the Court please, it is a photostatic copy I have here of these reports.

Q. The printed directions which are shown on the back of that form and the words of these forms were, of course, there at the time they were furnished by the Minnesota Tax Commission?

A. Yes, sir.

Q. And the returns made by the Dubuque & Sioux City R. R. Co., operated under lease by the Illinois Central, as [fol. 36] shown on the back of this report, were made in conformity with the form furnished by the State and in conformity with these instructions?

A. Yes.

Q. Let's refer to the first page, of the first return which I believe, is for the six months period ending June 30, 1922. That is right?

A. That is right.

Q. The first item is freight revenue, is that right?

A. That is right, yes, sir.

Q. How is the freight revenue allocated to the State of Minnesota?

A. The freight revenue is all allocated on a mileage pro-rate.

Q. So the freight revenue accruing wholly within the State, being all intrastate, and Minnesota earnings on the shipments from outside of the state and into the state, you say is pro-rated on a mileage basis?

A. It is pro-rated on a mileage basis.

Q. That, of course, is capable of accurate and definite ascertainment, is it not?

A. It is.

Q. Switching, referring to the second item. That is all local?

A. That is local.

Q. And is all capable of accurate and definite ascertainment?

A. Yes, sir.

Q. Demurrage. All local, is it and can be determined with absolute accuracy?

[fol. 37] A. Yes, sir.

Q. Storage, freight, is local?

A. Yes.

Q. Milk revenue, that is on a mileage pro-rate?

A. Yes.

Q. And other freight train revenue. There is none here, but if there were any it would be on a mileage pro-rate?

A. Yes, sir.

Q. Passenger revenue, that is on a mileage pro-rate?

A. Yes, sir.

Q. And so, too, the other earnings there stated?

A. Yes, sir.

Q. Excess baggage revenue?

A. That is the same.

Q. Storage baggage?

A. That would be the same.

Q. There is none here, but that would be the same?

A. Yes.

Q. And other passenger revenue, that would be pro-rated?

A. That would be pro-rated.

Q. Without taking the time to read each and all of these other items, it is true, is it not, Mr. Bergstrom, that with the exception of the freight car per diem—?

A. Yes.

Q. All of those items are capable of definite and accurate, positive ascertainment?

A. Not all the items.

[fol. 38] Q. Well, except what?

A. For instance the express.

Q. That is pro-rated?

A. That is based on the loaded express car miles bears to the loaded express car miles in the system.

Q. But that, of course, is revenue or credit which arises upon the operating road's operations or—?

A. That is true.

Q. And the item of freight car per diem credit is an item of earnings or claimed earnings arising off the line of the reporting road, isn't that true?

A. Yes, sir.

Q. In other words, until the freight car gets off the line of the Dubuque & Sioux City or the Illinois Central, there is no per diem credit—?

A. For that car, no.

Q. You checked through the reports and found them all made in conformity with the same information?

A. Yes.

Q. And the items were computed in that manner correctly by you, with respect to that first one of the reports?

A. They were.

Q. At the time you made your audit or check of the Dubuque & Sioux City RR's returns for these years 1922 to 1929, did you check the Hire of Equipment item?

A. I should say we did. It was at the height of the work [fol. 39] at that time and I had a helper at that time, but I can assume he checked that.

Q. It was your intention and purpose to check all of the items?

A. It was.

Q. All of the returns?

A. That is true.

Q. Will you explain to the court the basis on which the returns were made in that examination for the Hire of Equipment?

A. On the old basis.

Q. The old basis?

A. Yes. That was the total receipts of any given road, and the total of the disbursements of the examined road. Deduction was made and this was credited with all tax, with receipts on the basis of the loaded freight car miles of the road being examined.

Q. As applied to the Illinois Central then, the Hire of Equipment return would be based, for that particular period, the six months ending June 30, 1932—

A. 1922.

Q. 1922. Thank you. Upon the examination of these items, and these items are correct?

A. That is right.

Q. And the company has made a return for those 6 months, showing a balance for the six months of \$47.14, is that correct?

A. Yes.

Q. That is——?

Q. That is not the tax. The totals are added up. That [fol. 40] is, taking in all of the different taxable accounts, all your revenues and part of the revenues, five percent of that would be the tax.

The Court: Five percent is the taxable amount?

A. Yes, sir.

Q. I call your attention to the return for the six months ending December 31, 1922?

A. Yes.

Q. And this item—No. 22 which is Hire of Equipment, is a credit balance on freight cars in transportation service, that is the result there?

A. That is no tax.

Q. And no credit balance——?

A. No credit balance on passenger cars.

Q. And on freight cars there is no credit balance?

A. No credit balance on freight cars.

Q. Did you find on the back of this exhibit, Mr. Bergstrom, any instructions for making returns on Hire of freight equipment?

A. —.

Mr. Oehler: I think the exhibit speaks for itself, if the court please.

The Court: It may be preliminary to some question.

A. Yes, there is.

Q. There is the heading, rental for use of equipment in transportation service——

Mr. Oehler: Object to the reading from those exhibits until they are introduced in evidence.

Mr. Helsell: The defendant offers in evidence the 16 parts of Exhibit 2. There being no objection, I call your attention again to the caption found on the back of the book, the instructions on the form printed and furnished by the Minnesota Tax Commission: Rental for use of Equipment in Transportation Service, and the amount

received by the company for the cars employed in transportation, in excess of the amount paid out by it for the use of other cars of other companies: that is the method used and those were the instructions under which the report was made at that time?

A. Yes, sir.

Q. Now the next paragraph: "where accounts are kept between different companies and charges are adjusted for such service, up to the point where accounts balance, the operation is a mere exchange of use of the cars, but the amount received by any company for the use of its cars in excess of the amount paid out by it for the use of the cars of other companies is one of its sources of revenue earned by its rolling stock, and should be included in the gross earnings." That was a part of the instructions and was followed in the making of this return?

A. Yes.

Q. I call your attention to the succeeding three paragraphs which I will not take the time to read, they are also instructions on this printed form furnished by the State?

A. Yes.

Q. That was the form used in each instance during each of the six months periods for the years in question, when [fol. 42] the tax was paid by the company, the Dubuque & Sioux City RR, which made the returns?

A. That was paid.

Q. At the time your examination was made, the audit of the books of that company in 1931, those rules were still in force, were they not?

A. I couldn't say that positively, Mr. Helsell, without seeing the form. They have changed.

Q. But so far as you know they were the same?

A. So far as I know they were the same.

Mr. Helsell: You may cross-examine.

Cross-examination.

By Mr. Oehler:

Q. The exhibit Mr. Bergstrom referred to Defendant's Exhibit, has not been received?

A. —

Mr. Helsell: Defendant offers in evidence Exhibits Nos. 1 and 3.

Mr. Oehler: Object to Exhibit 3 as immaterial.

The Court: It may be received.

Mr. Oehler: Exception.

Mr. Helsell: In case anything may arise over the misnaming of the exhibits, the defendant renews its offer and offers Exhibits 1, 2 and 3.

The Court: You have them all marked and received. Exhibit 1, as I recall, was that computation, compilation.

Q. Referring to the first page of the summary, being Exhibit 1, I will ask you where the figures thereon set forth were obtained?

A. The Illinois Central furnished the figures.

[fol. 43] Q. Where it appears on page 2, where was that obtained?

A. Illinois Central.

Q. In other words this special report was compiled, insofar as the figures were concerned, and made out from the figures furnished by the Illinois Central R. R. Co.?

A. They were.

Mr. Oehler: That is all.

Mr. Helsell: That is true with one exception. The Illinois Central did not furnish you the road mileages.

Witness: That is true, Mr. Helsell, but it was my understanding there was an agreement between the railroads in the furnishing of these figures and on this source we figured they probably had a part in the compilation of these figures.

Mr. Helsell: Mr. Oehler, it is true you don't question the accuracy of the figures shown in Exhibit 1?

Mr. Oehler: No, I won't substantiate it or admit it's correct, will you?

Mr. Helsell: We will admit that the per diem credits were correctly shown by Exhibit 1. Will the State admit it is correctly computed?

Mr. Oehler: I don't admit the proportion.

Mr. Helsell: Perhaps the difference could be better expressed by an admission that the computations are accurate, but the defendant does admit, of course, that they legally applied in accordance with the statutes.

Mr. Oehler: If I may answer that correctly. You admit [fol. 44] the various proportions, insofar as it related to Minnesota percentages are correct, am I right on that, on page 2, of Defendant's Exhibit 1; that the Minnesota percentages loaded freight car miles basis, in parenthesis, is

correct. Understand I am not—you don't have to answer these questions. I am not trying to cross-examine you as a witness—

The Court: As I understand your contention, the principal point is whether or not you are entitled to charge the Illinois Central with everything they have received on Minnesota business and only credit them what they paid out in proportion to what the Minnesota mileage bears to the total mileage.

Mr. Oehler: That is correct, I am concerned with the record on that, if the figures employed in the exhibit were correct, not necessarily the application of them.

• • • Off the record at the request of counsel while they confer with the court • • •

Mr. Helsell: It is further agreed that the percentage in the next to the last column of the annual statement in Exhibit 1, which is under the caption, Percentage deductible, parenthesis, loaded freight car mile basis, parenthesis, is correctly shown by that exhibit.

Mr. Oehler: That is satisfactory.

The Court: The point in dispute is whether the proper basis is employed in reaching those figures, as I understand it.

Mr. Oehler: That is my understanding, if the court please. [fol. 45] Mr. Helsell: That is all.

(Witness excused.)

Mr. Helsell: It is agreed that Exhibit No. 2, consisting of the Dubuque & Sioux City R. R. Co., duplicate original of the report may be substituted, or rather that photostatic copies may be substituted for that.

Mr. Oehler: That is satisfactory to me.

MR. ARTHUR W. STOKES, called as a witness on behalf of the Defendant, being first duly sworn, testified as follows:

Direct examination.

Mr. Helsell:

Q. Mr. Stokes, where do you live?

A. Chicago, Illinois.

Q. What is your business?

A. Car accountant for the Illinois Central Railway system.

Q. What experience have you had in that work?

A. Thirty years.

Q. All in car accounting work?

A. The last twenty years has been connected in car accounting work. Prior to—ten years before that it was indirectly, working on car accounting itself and transportation, both.

Q. Do you also keep the car accounts for such cars as are operated over the rails of the Dubuque & Sioux City Ry. Co.?

[fol. 46] A. I do.

Q. Do you know whether or not separate accounts are kept for the records of that company?

A. Separate records of that company? No, only in a general way.

Q. They have separate books of account?

A. They do not, in my office, no, sir.

Q. What records are kept of the interchange of cars between the railroads?

A. Well, when one of our cars goes off the line we get a report for it, an interchange report for it, something from the road it is delivered to, and that interchange report is made in four copies, and the receiving road agent sends two copies back to us and I generally send one copy into the office and keep one for my file.

Mr. Oehler: That work is done on behalf of the Illinois Central?

Witness: Yes, sir, and for the Dubuque & Sioux City at times where they interchange cars, of course.

Q. Before we pass on to other forms of records, will you produce for us a copy of such a record so we will have before us just what you refer to?

A. (Witness produces Daily interchange report of cars.)

Defendant's Exhibit 4 marked (six sheets).

Q. Will you explain to the court what they are please. Mr. Oehler, have you a copy of those reports? (Passes Mr. Oehler copies.) Do you have there 6 altogether, counting the narrow sheets?

A. Yes.

[fol. 47] Q. There are 6 sheets on Exhibit No. 4?

A. Yes.

Q. Will you explain to the court what they are?

A. Each time the Illinois Central RR,—when we have a car delivered off the railroad,—there is a report made with six copies, four of the broad copies and two narrow sheets. As I said before, when a car is sent to a connecting line and the agent of that road receives the car, he checks the report to see it is correct and keeps two of the broad sheets for himself, and sends the yellow colored sheet with one of the broad sheets to his car accountant and retains one of the broad sheets for his file. He sends back the pink narrow sheet, with a broad copy to our agent who, in turn forwards the pink narrow sheet and one broad sheet to my office. After they are received in my office I have the narrow sheet cut up into slips and those go to our car record book and are kept by the company, showing the car so delivered to whatever railroad is shown on the report. Then I send the clippings of the cars on the report which are not Illinois Central cars, to the car owner indicating to him that his cars, which have been on our line, have been delivered to some other railroad. That is his record of the cars which are on our railroad and go to some other railroad when we are through with the car at that point. The narrow sheet we retain to our files for claim purposes and other matters. And other lines, in delivering cars to our line, they send me the yellow colored slip for my record showing they have received a car from [fol. 48] our railroad and they also send me a copy of the broad sheet which is retained in my permanent file.

Q. Are these records kept so there is a showing of when a car passes the state line? Is that kept by states or systems, or how?

A. We have no way of determining when they pass from one state to another state. The only record shows when the car reaches another road.

Q. Only when it reaches another road?

A. Yes, sir.

Q. Or when a car from another road reaches our line?

A. Yes, sir.

Q. And you say when this record, when it is received by you, is entered into what book?

A. In the car record book.

Q. And, as you say, shows only the movement of cars between railroads or connections with our railroad, and not the movement on our line between terminals.

A. What occurs on other railroads we just haven't recorded, of cars going on other railroads other than where it moves in on foreign lines, between the points it moves rather.

Q. What other records do you keep of interchange of cars?

A. Just those which you have referred to.

Q. That is the only record—?

A. Yes.

Q. Of interchange of all equipment. Now can you tell from any record, Mr. Stokes, how long any of our cars [fol. 49] would be on other lines in any particular State?

A. Absolutely not, no, sir.

Q. How often are the credits and debits of car days balanced?

A. Monthly.

Q. Is it balanced, system balanced?

A. Yes, sir.

Q. Do you have any car service rules or per diem code under which these accounts are kept and the car days, credits or debits computed?

A. We do.

Q. Where are they? What are they?

A. They are the codes of the A. R. A. Car Service and Per Diem and Switching Reclaim Rules which were in effect during the years 1922 to 1929 inclusive.

Q. Have you them with you?

A. Yes, sir.

Q. These books which the reporter has identified as No. 5, Defendant's Exhibit No. 5, are they the books of car service rules to which you refer?

A. They are.

Defendant's Exhibit No. 5 marked (6 books.)

Q. And was the method of accounting during the eight years in question substantially the same as at this time?

A. Yes, sir.

Q. Any change in the rules would not then, as I understand you, effect the method of accounting?

A. No, it would not, no.

[fol. 50]. Q. Or the car service records which were kept by you?

A. No, sir.

Q. Are the records which you refer to uniform between all of the carriers?

A. In general they are, yes.

Q. In other words the other railroads kept the same kind of records that you kept?

A. Substantially, yes.

Q. Do your records show the time when the cars of the roads, respective roads, reached other stations?

A. No, sir.

Q. Or when the cars of any road reach another line in any particular state?

A. That is not shown by their records, no, sir.

Q. Nor the time of reaching another line, except as shown on the interchange report, when they have a junction with another road, showing the time they got to the junction?

A. After it gets rid of the car they don't know what time that time is.

Defendant's Exhibit 6 marked.

Q. I will call your attention to Exhibit 6, which is a printed pamphlet on the face of which is entitled, Code of Car Service Rules, Code of Per Diem Rules, effective April 1, 1933. Are those rules the same as those shown so far as the method of accounting is concerned those in the six books Exhibit 5?

A. —

Mr. Oehler: Object to that as immaterial and on the fur- [fol. 51] ther grounds—they are only copies of other books, we submit substantially as the printed pamphlet form and—

Mr. Helsell: The defendant offers in evidence Exhibit 6.

Mr. Oehler: We object. Exhibit 6 is a duplicate of Exhibit 5 and object on the grounds it is wholly immaterial. The State is not bound by any rules that the defendant may have.

Mr. Helsell: We offer Exhibit 6 in lieu of Exhibit 5.

The Court: I suppose the only purpose of this is, it's a pamphlet containing other, more recent information.

Mr. Oehler: Object to that as immaterial. You are now offering Exhibit 6 as a substitute for Exhibit 5? Is that correct?

Mr. Helsell: That is correct.

Mr. Oehler: I'll have to object to the substitution and to Exhibit 5, being on the grounds it is immaterial. The State is not bound by any rules that—of the American Railway Association.

Mr. Helsell: I will add a little further foundation before the ruling is made on the objection.

Q. Mr. Stokes, these rules which you say are those in effect during the years to which I called your attention and are substantially the same for all of the years with respect to requirements for accounts. Are those rules the same for all of the companies? All the different railroad companies do operate under them?

A. They do.

[fol. 52] Q. And have been in use for the inter-change of cars?

A. Yes.

Q. And are the rules under which your accounts were kept during these years 1922 to 1929?

A. Yes, sir.

Q. Do they describe the rates of payment, the amounts of payment and the method under which those are computed?

A. They describe the time and the amount, but do not say what the payment is.

The Court: Are these rules submitted to the Interstate Commerce Commission?

Mr. Helsell: They have to be approved by the I. C. C. your honor.

Q. Now will you explain, briefly, what you mean by reference to a balance; credit balance?

A. Well, at the close of each month, each railroad in the United States makes a report to the other railroads of the companies that has cars on its line showing on that report the number of days that car was on each particular railroad. They send their report in to me and then I make another report to them showing the number of days their cars were on our railroad and if one off-sets the other there is a balance.

Q. Do you know the character of the Illinois Central RR as a whole—in order to get the purpose of the question, the difference between the operation of the Illinois Central and

Dubuque & Sioux City,—is it a separate system or bridge system or bridge road or——?

[fol. 53] A. —

Mr. Oehler: I object to that as indefinite.

The Court: What do you mean by bridge road?

Mr. Helsell: I will ask Mr. Stokes.

Q. Mr. Stokes, will you explain what is meant by a bridge road?

A. As I understand it, where we use the car that passes over our lines and it is given to another company where the car of the original line passes over our line and is sent to some other company. That is as I understand it.

Q. You mean by that, that the larger portion of the company's business is that character?

A. —

Mr. Oehler: I move the question and answer be stricken out as leading.

The Court: It is leading, of course.

Q. What did you mean when you referred to your term bridge road?

A. That is the relationship showing the relative percentage of the transportation which originates on the line of some other road.

Mr. Oehler: Object to that as immaterial. There is no question about that.

Q. Do you know, during these years, from 1922 to 1929, whether the Illinois Central had cars in excess of its own requirements?

A. —

Mr. Oehler: Just a minute. I object to that as immaterial.

The Court: I think he may answer.

Mr. Oehler: Exception.

[fol. 54] A. No, I don't believe we did. If we had all our cars on our railroad we were just able to take care of the requirements.

Q. To what extent do these records accumulate? Does it amount to a large volume?

A. —

Mr. Oehler: Objected to as immaterial.

A. They do.

The Court: He may answer.

A. They do.

Mr. Oehler: Exception.

A. They do, we have quite a number of records of different kinds.

Q. Is there any rule or requirement of the Interstate Commerce Commission with respect to the length of time the records must be kept?

A. Yes, there are certain lengths of time we have to keep them.

Q. Were the records, the car account records, with respect to interchange of cars during these years, kept for the length of time required by the rules of the Interstate Commerce Commission?

A. They were.

Q. And are those records now available——?

A. Yes.

Q. So that you can tell with definite accuracy the exact interchange of cars with each separate road?

A. No.

Q. Were the returns made out by the Dubuque & Sioux City Ry and reports filed with the Tax Commission of the State of Minnesota, for each of these years, in accordance [fol. 55] with the records which you then had available?

A. Yes.

Q. Were the instructions found on the report prepared and furnished by the Tax Commission of the State of Minnesota?

A. —

Mr. Oehler: Objected as calling for the conclusion of the witness.

Mr. Helsell: Withdraw the question then.

Q. Mr. Stokes, when you undertook to determine the length of time one of our cars was on another road in Minnesota, during, for the year 1922, would a check have to be made of the books of the using company?

A. Yes, sir.

Q. In other words there are many instances in the interchange of cars, are there not, where we have a record of delivery of a car to another company, and of that other company delivering it to a third company, probably several succeeding companies. That is the reason, in order to follow the per diem record, it would be necessary to have access to the records of other companies?

A. Yes, sir.

Q. Even though you may have access to the records of the other company, could you, from those records, or of your own, tell when a car was in the State of Minnesota?

A. We could not.

Q. Is it true that the other roads, in conformity with the rules of the Interstate Commerce Commission, and followed [fol. 56] by you, keep their records and information a required period of time?

A. That is right, as I understand it, yes.

Q. And so far as the requirements of other roads to disclose the interchange of cars during these years, those records are no longer available, is that true?

A. That is true, as I understand it.

Q. What is the length of time required to keep the records?

A. —.

Mr. Oehler: Object to that as immaterial. It is conceded that the figures here are correct.

Mr. Helsell: Withdraw the question.

(Counsel confer with one another.)

Q. What is meant, Mr. Stokes, by re-claims?

A. When a railroad handles a car on a road haul service and delivers that car to another road haul service and the car is handled in switching service, that car switching service is paid for as a switching service charge and does not include any per diem charge or credit for per diem. Therefore the switching road re-claims from the road haul carrier for the number of days that it was on the road while it was being switched.

Mr. Oehler: If the court please, I want to object to that question and answer and move it be stricken upon the grounds that the State has admitted that the figures, the amount as shown by Defendant's Exhibit 1 are correct. Now then, if they are correct, it is fair to assume that the

reclaims, if any, have been taken care of, or were taken [fol. 57] care of prior to the time that the figures were submitted to the taxing authorities of the State.

The Court: As I understand it these figures show the amount the Illinois Central paid to other roads and the amounts the roads paid them are shown in this exhibit are correct?

Mr. Oehler: That is my understanding.

The Court: That is for Minnesota business?

Mr. Oehler: If that be so, the court and myself may assume, if there is any offset by virtue of reclaims they were taken care of before these figures were submitted.

Mr. Helsell: If the court please, while we agreed the figures are correct, we did not agree, in the first place, that any accounting or allowance had been made for reclaims, or that the Minnesota proportion which is shown by this exhibit was correct or legal. In order that that may be developed we propose to show by this witness that reclaims are allowed and they are not included in the claim of the state and no allowance is made by the State.

Mr. Oehler: I don't wish to prolong this, but as I understand it, the figures here show the road receipts and disbursements and that the reclaims or offsets claimed by the various roads certainly were taken care of before the figures were arrived at as disclosed by Exhibit 1.

The Court: Let's find out what the facts are in that relation.

Q. Have you answered the question?

A. —

[fol. 58] The Court: He finished by telling what is meant by re-claims.

Q. Well, so that we may have it clear in the record what is meant by re-claims, will you—?

A. —

Mr. Oehler: I object on the admitted statement here that it is immaterial because the court and state may assume the re-claims have been disposed by the figures arrived at in Exhibit 1, before they were ever submitted.

The Court: Well, I think perhaps that may be a fair inference, Mr. Oehler, but I think I will permit him to answer

and find out what the facts are. Your objection won't vary the total a great deal.

Mr. Oehler: Exception.

A. A reclaim is an amount credited to the switching line for performance of switching service on a car received from a road haul carrier. The switching road credits the per diem on the car on the reclaim for the amount so credited from the road haul carrier bringing the car into the terminal and on which the road carrier receives a part of the through rate and the switching carrier only receives a switching charge.

Q. Now the arbitrary re-claims?

A. —

Mr. Oehler: Same objection.

A. An arbitrary reclaim is an arbitrary amount determined by a check of the records of each switching line for a period of, say one year, determining the number of days the car was in terminal switching, with an assumed switching service for each switching road.

[fol. 59] Q. And the final allowance of these reclaims, whether arbitrary or otherwise would they affect the ultimate settlement between the companies or the credit balance, if any, or the debit balance?

A. They would be included in there, yes.

Mr. Oehler: Same objection.

The Court: He said they would be included.

Mr. Helsell: You may cross examine.

Cross-examination.

• M Oehler:

Q. Referring to Defendant's exhibit 4, Mr. Stokes, Defendant's exhibit 4 consists of 4 sheets, a pink and a yellow one which are identical, and four white sheets which are likewise identical; is that correct?

A. Yes, sir.

Q. And Exhibit 4 is issued by the defendant for keeping track of the various equipment, box cars on other lines and box cars within its own line?

A. Yes, sir.

Q. And can you, by the use of this Exhibit 4 and by the records that may be brought out of them, tell anything, take in a year, where any one of your cars are?

A. On other roads? - And from Exhibit 4?

Q. Yes.

A. No, I couldn't.

Q. Can't you tell where the car is?

A. From Exhibit 4, no I couldn't.

Q. Well, can you tell from any record you keep where a certain box car owned by your Illinois Central is?

[fol. 60] A. On my line alone I can, yes.

Q. What record do you have that you keep that from?

A. We have a wheel report and I have here a copy of them.

Q. Let's see it?

(Witness passes paper to Mr. Oehler.)

State's Exhibit B marked.

Q. Can you, by referring to State's Exhibit B, tell the court what that is?

A. It shows the movement of cars on the Illinois Central from one terminal to the other terminal at any time that it may have a train.

Q. Is Exhibit B kept only with reference to Illinois Central cars?

A. No, it is not.

Q. Is it kept with reference to cars of foreign roads?

A. A record of every car the Illinois Central has on its line is kept.

Q. Then Exhibit 4 is likewise supplemented by Exhibit B, is that correct?

A. That is correct. Exhibit 4, shows the delivery of cars on or off the line. Exhibit B is the movement of cars on the Illinois Central alone.

Q. What is the purpose of Exhibit 4?

A. It shows the record of cars as delivered off the Illinois Central.

Q. Well now I will ask you this, isn't it the primary purpose of Exhibit 4 to keep all roads advised as to where other railroads may have its cars?

A. That is not the primary purpose, it is one of the purposes.

[fol. 61] Q. What is the primary purpose?

A. Well, while the car is in the Illinois Central's possession, they are responsible for the car when it is delivered over to the Illinois Central. This record is made and signed

for by the receiving road, but it is kept in the other road's accounts, and that is the basis for the car owner making a report of where his car is located and we send this cut-up slip to the car owner showing the road it was delivered to, and he enters it in his records and he sends the slip along to me then for the record of the Illinois Central and that accounting is sent from one road to the other.

Q. Then Exhibit 4 may be for the purpose of keeping other roads advised as to the whereabouts of that particular car, naming the owning company of the car, the operating road of the car, in this instance by the Illinois Central and the company it was delivered to by the Illinois Central?

A. That is correct.

Q. Can you, by referring to Exhibit 4, which is in this instance at least a written record or receipt, keep the railroads advised who has that car and where it may be from time to time?

A. Not from where the road takes possession of the car.

Q. But a summary by stations is sent which is simply a receipt for the car, that is what it is?

A. Yes, that is what it is.

Q. And when the Illinois Central gets that, we will say from the Great Northern, a receipt for one or more cars, whatever the cars may be—the description and then when [fol. 62] the Illinois Central by virtue of the description of the cars gets rid of it, they in turn send it to the Great Northern if they are given to a foreign road?

A. No, we don't do that certainly, we send one of the slips.

The Court: It is a handling system for keeping track of the movements for that car?

A. That is it exactly.

Q. Exhibit 4 shows the road that has the car and also the junction point where the various roads get it?

A. Yes, sir.

Q. As far as the delivering and receiving road is concerned?

A. Yes.

Q. And it shows, apparently, the date the delivery was made?

A. Yes, the date of delivery, the delivering road delivering the car and the road receiving the car and the station.

Q. That is the place where it was delivered to whatever road may be involved.

A. Yes.

Q. Then from Exhibit 4, so far as your records are concerned, Exhibit 4, is for your own railroad, not foreign cars?

A. No, sir, it's for cars belonging to other roads. It is used for every car we have over our line, this exhibit 4, but also the Illinois Central and every kind of car. It is sent to the car owner. When we deliver an I. C. car so that we [fol. 63] have that record. When a Northwestern car is delivered to our rails they have no record until we send this junction slip showing the car was delivered to the I. C. and they do that as well on the Great Northern.

Q. Then am I right, as indicated by the court, the purpose of Exhibit 4, is to indicate to the road owning the car where it is, on what road the car may be?

A. Not necessarily the location, no.

Q. But that is important to the road that may have the car?

A. Yes, because that is what the per diem credit is based on, the date they get the car.

5 p. m. Court adjourned.

Tuesday, Jan. 18, 1935. 10 a. m.

Mr. Oehler: The State offers Defendant's Exhibit 4, being a blank of printed form, Freight conductors wheel report of the defendant.

Mr. Helsell: Shouldn't that be offered by us?

Mr. Oehler: You can adopt it.

The Court: What is it called?

Mr. Oehler: Freight Conductors' Wheel Report.

MR. ARTHUR W. STOKES, previously sworn as a witness on behalf of the defendant, resumed the stand and testified as follows:

Cross-examination.

Mr. Oehler:

Q. Referring to Exhibit 4, Mr. Stokes, will you tell the court what that is?

[fol. 64] A. That consists of the trains leaving one terminal until it arrives at the next terminal, showing the individual car by initials and the car, the station taken at, the station arrived at and the date.

Q. Does it show the foreign cars as well as the cars of the road upon which it is operated?

A. It shows all the cars in the train whether foreign or system cars.

Q. May it be understood when you use the term foreign cars I am referring to a car owned by a road other than the Illinois Central?

A. That is right.

Q. Now, is Exhibit B supplemented by other papers in connection with keeping track of where the various freight cars of the defendant are, at a given time?

A. —

Q. Except that narrow sheet on top of that record, do you take that off?

A. —

Q. This one, the sheet which you use for car records?

A. Exhibit B is used for record purposes. We keep the Exhibit B for a prescribed time by the Interstate Commerce Commission, three years, I believe it is.

Q. And you say that every car whether foreign owned, or owned by the Illinois Central is listed on that exhibit B?

A. In that particular train, yes.

Q. Well, can you tell at any time where your own cars are?

[fol. 65] A. According to the dates we can, yes.

Q. Can you tell where it is on your own line?

A. Yes.

Q. May I put it this way, you have records available whereby you can tell where the Illinois Central cars are at any time, is that right?

A. At any time according to the dates, not according to the time of the day.

Q. According to the state—according to the date you can tell in what state they are?

A. According to the date I couldn't tell when they moved from the state. That would make a difference of a fractional day. It might make a difference in the day per diem. Figuring on mid-night, if it gets into a state before mid-night that would be another day, so that the date where it

arrives in the state five minutes after mid-night, that date would not be assigned to the state.

Q. Well then, put it this way, can you, within a day, tell in what state your own cars are if they are on your line?

A. Within a day I can on our line, yes.

Q. You can tell in what state they are?

A. Possibly I could. If it might make a long run that took two days in making a run—may be I would not be within a day in guessing the time it was in one state or another.

Q. You really don't have to guess, you have a record of where they are?

A. I have not according to the time, I have according to the days. When a train leaves one terminal and arrives at another terminal we keep a record of the date of arriving [fol. 66] at the distant terminal. That is the only date that is shown on the record.

Q. Can you tell within a day where your cars are, what state they are in?

A. In mostly all instances I can tell within a day. On the Illinois Central, on our own line.

Q. On your own line?

A. Yes, sir.

Q. How do you keep that record?

A. We enter that in the car record freight book. It is the same information shown on Exhibit B in the first column of the narrow sheet on the report.

Q. Now you do the same thing about foreign cars, so-called—?

A. We do.

Q. As on your own line?

A. Yes, sir.

Q. So you can tell where they are?

A. Within a day, yes.

Q. Within a day?

A. Yes.

Q. And within what state they are?

A. Within a day.

Q. Within a day or so?

A. Yes, I would say a day and it may be they might move in two or three states before the train gets to its destination.

Q. So, within Exhibit B, you can tell within a day where all the cars are? Both foreign and your own cars?

[fol. 67] A. On our own line.

Q. On your own line?

A. Yes, sir.

Q. And is that true of other roads?

A. Yes, sir.

Q. They know—can tell how long cars are—I will take the Great Northern, can you tell within a day how long or the number of days the Illinois Central cars were on its line in Minnesota?

A. Within a day or so I could say they could.

Q. That is all. Just one minute. (Mr. Oehler confers with Mr. Bergstrom). From your records available, Mr. Stokes, can you furnish to this court the number of days these various cars were upon the Illinois Central line, or where they were located within a day—?

A. For that period in question?

Q. For any period?

A. We couldn't furnish it now because the records have been destroyed. I can go back 6 years—

Q. To '29?

A. On my records, yes, sir.

Q. Within at least six years?

A. Yes.

Q. Within a day you could tell as to the exact time of a car in this State?

A. Yes.

Q. Have you the record of the cars passing through the State at mid-night?

A. I couldn't tell that absolutely. To try and make a guess would be an enormous amount of work.

[fol. 68] Q. But that information could be obtained with fair accuracy by referring to the train and the date or hour the train arrived at the next junction point?

A. Oh, I could make a guess at it.

Q. A fairly accurate guess?

A. Yes. Upon the time the train arrived at its next junction point and the number of miles it had traveled from the time it got into one state until it arrived at the junction point.

Q. For the last six years, within a day, information is available as to the period of time foreign cars were on the Illinois Central road and as to the period of time the Illinois Central cars were on foreign roads?

A. If you didn't want to take into consideration the expense that would be connected with the work and work it up, that information is available.

Q. It is?

A. It is, if you could find the time to work it up because it would be a large expense and time to do it. You would have to take every car and figure out where it was.

Q. This information is available by the railroads, especially the Illinois Central, could furnish this court information showing the actual time that foreign cars were on its road in Minnesota, and the actual time its cars were on Minnesota roads?

A. Not the actual time.

Q. Within a day?

A. Approximately under the considerations I just mentioned.

[fol. 69] Q. Within a day?

A. Yes, sir.

Q. Have you that information available now?

A. It is some place in the wheel reports. Yes, I have those records since 1929. It could be worked up. As I said it could be worked up, but it would be almost impracticable to do it.

Q. That is every car?

A. Every car we have handled in the last six years.

Q. Well, have you destroyed the records prior to 1929?

A. Yes, we have.

Q. What was the last year you destroyed the records for?

A. I couldn't say.

Q. I am talking about these records, those wheel reports, freight conductor's wheel reports?

A. I have them for 1929, that is the last year.

Q. That is the last year they are available?

A. Yes.

Q. And the contents of the destroyed reports are not summarized in any other books?

A. The dates are in the car report book.

Q. Kept in the car report and that information, you say, is available, could be furnished since 1929?

A. That is available.

Q. And the books for a period prior to that time—The information taken from the records—does the wheel reports show the time the car arrived in the next terminal?

[fol. 70] A. The car record book does not show the time, no, sir.

Q. And from the contents of the wheel reports, are the reports of the period of time then, within a day, when a foreign car is on your line and the dates your cars were on foreign lines, could be computed?

A. With a great deal of expense, yes.

Mr. Oehler: That is all.

Re-direct examination.

Mr. Helsell.

Q. Mr. Stokes, if a car, on any particular day passed through three states, would there be any way of telling, from your records, in what state it was at mid-night?

A. Not one on which you could allocate that per diem credit to any State, no, sir, you could not.

Q. You spoke of having destroyed these records. Are the records kept—do you keep all of the records, company records, of these per diem credits and debits for a period of time required under the rules of the Interstate Commerce Commission?

A. I did.

Q. And the task of accounting of the per diem debits and credits would involve a total of how many thousands. Of many thousands, would it not?

A. It would.

Q. Give the court some idea of how many thousand?
[fol. 71] A. —.

Mr. Oehler: Object to that as immaterial.

The Court: He may answer.

Mr. Oehler: Exception.

A. We have received—we receive reports of interexchange movements of 35,000 a day, approximately, or a little over one million a month and they all concern per diem credits or debits to a greater or less degree.

Q. Is that at the present time or during the period in question?

A. During the period in question, for approximately 50 per cent more.

Q. So there would be 50,000 or more credits and debits involved during these years 1922 to 1929?

A. That is about what we were receiving at that time, yes.

Q. And there would be then a possible error of a day involved in 50,000 credits or debits for each day's accounting?

A. I wouldn't say it would be that high, no but it would run into a great amount.

Q. Would there be a great many for each day?

A. There would be a debit or credit of one day involved in each car we handled, and may- two or three in one particular car.

Mr. Helsell: That is all.

Mr. Oehler: That is all.

(Witness excused.)

[fol. 72] MR. G. J. BUNTING, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

Q. You live in Chicago, Mr. Bunting?

A. I do.

Q. What is your business?

A. Vice President in charge of accounts and finance of the Illinois Central R. R. Co., and the Yazoo & Mississippi Valley R. R. Co., Chicago, St. Louis & New Orleans R. R. Co. The Gulf & Ship Island R. R. Co. and the Dubuque & Sioux City including the Chicago and Illinois Western Ry. Co., of which I am auditor.

Q. What experience have you had in railroad work?

A. Well, my first was in a little railroad called the Chocowinity in North Carolina, about 1899. Subsequently I was examiner with the Interstate Commerce Commission for about three years and from there I went to the Chicago, Milwaukee & St. Paul Ry., and, as general accountant, to assistant general auditor, auditor and comptroller. In 1920 I was requested to go to Washington in connection with the guarantee settlement between all of the railroads in the country and the government. That is, the guarantee period being six months subsequent to Federal Control. At the close of that work I came back to Chicago as Comptroller of the Illinois Central R. R. and the various positions I have [fol. 73] mentioned to Comptroller and subsequently was, in October, 1923, I was elected Vice President of the various lines.

Q. As Vice President in charge of accounts, is there under your supervision the keeping of accounts and records of debits and credits resulting from interchange of freight cars?

A. Yes.

Q. Have you had any position with the American Railway Accounting Association?

A. Yes, I have, in 1930 I was President of the Railway Accounting Officers' Association. That is an International organization composed of accounting officers of railroads over the entire world. That is, we have representatives from all sections and then for a period of about 15 years I have been a member of the—what is known as the committee on general accounting and that committee is the committee which submits to the I. C. C. all questions of accounting and which we handle with them for the purpose of seeing that they are in proper shape for use by the railroads.

Q. In your department are the accounts kept for all of these several companies that you have mentioned?

A. Yes, sir.

Q. Are separate accounts kept for the Dubuque & Sioux City Ry. Co.?

A. They are, yes.

Defendant's Exhibit 7 marked.

Q. Calling your attention to this printed pamphlet which the reporter has identified as Exhibit 7, I will ask you to [fol. 74] state, if you know, what that is?

A. Yes, I know what that is.

Q. Will you state what that is?

A. This is the contract between the Illinois Central R. R. Co. and the Dubuque & Sioux City R. R. Co. with reference to the agency operation of the Dubuque & Sioux City R. R. Co. and the method of disposing of the income derived from that operation. The contract is one whereby the earnings derived—

Mr. Oehler: I think you have described it sufficiently. I object to any further description of the exhibit. The exhibit speaks for itself.

The Court: I suppose it ought to be introduced before the contents are gone into.

Mr. Helsell: Defendant offers in evidence Defendant's Exhibit 7, subject to the objection that the contract is the

best evidence, I will ask you, Mr. Bunting, briefly for the court, to describe the general character of this agreement.

A. —

Mr. Oehler: Object to it as not the best evidence.

The Court: Of course, the contract will speak for itself but it is a lengthy document and I see no objection to the witness referring to the contents for the purpose of illustrating the evidence.

Mr. Oehler: Upon the court's remarks I will withdraw the objection.

A. The contract provides that all of the earnings derived from the use and operation of the Dubuque & Sioux City [fol. 75] R. R. Co., should be disposed of in the following manner, for instance, the funds derived first be applied to the maintenance and cost of operating the property. Second, to the payment of interest on any bonds of the Dubuque & Sioux City R. R. Co. that are outstanding in the hands of the public. If there is any fund then left from the operation they are to be used for the purpose of paying into a sinking fund some small amount therein indicated for the purpose of paying off the bonds. If there is any residue after that the Illinois Central R. R. Co. shall turn the remainder over to the Dubuque & Sioux City R. R. Co. to be used as the directors of that railroad are disposed to use it. So that not one dollar of the earnings of the Dubuque & Sioux City R. R. Co. are retained for any purpose by the Illinois Central R. R. Co.

Defendant's Exhibit 8 marked.

Q. Calling your attention to this printed pamphlet identified as Exhibit 8, I will ask you what that is?

A. That is an agreement between the Dubuque & Sioux City R. R. Co., and the Illinois Central R. R. Co., modifying Article V of the lease of July 1, 1904 which was executed in—November 27, 1912, the particular purpose of which was to change the trustees under the sinking funds of bond issues.

The Court: What is the date of that original agreement?

A. July 1, 1904.

Q. Subject, of course, to the objection that the exhibit itself is the best evidence, I will ask you to state for the benefit of the court, does the supplemental agreement

which you are now referring to in any way modify the disposition of the earnings, gross or net, of the Dubuque & Sioux City R. R. Co.?

A. No, sir.

Mr. Oehler: Objected to as immaterial.

The Court: He may answer.

Mr. Oehler: Exception.

Q. I now call your attention to what appears——

Mr. Helsell: Defendant offers in evidence Exhibit No. 8.

The Court: That is the modification?

Mr. Helsell: Yes.

Q. I now call your attention to——

Defendant's Exhibit No. 9 marked.

Q. I now call your attention to this map which has been identified by the reporter as Defendant's Exhibit 9, and ask you to state what that is?

A. It is a map that shows the line of railways operated by the Illinois Central system lines, and in red there is indicated that part of the system lines being that part of the Dubuque & Sioux City R. R. Co.'s property within the state limits of Minnesota. The remainder of the Dubuque & Sioux City R. R. Co.'s lines are indicated thereon in green. The remainder of the Illinois Central system lines, other than the Dubuque & Sioux City R. R. property are indicated in blue.

Q. In your answer, Mr. Bunting, you have referred to the Illinois Central system, that is a name under which all of the several corporations are operated?

[fol. 77] A. Yes, sir.

Q. It is not a legal entity, itself, a corporation?

A. No, sir.

Q. What is the mileage of the Dubuque & Sioux City R. R. Co.?

A. —

Mr. Oehler: Objected to as immaterial.

The Court: He may answer.

Mr. Oehler: Exception.

A. I haven't that before me. You mean in Minnesota?

Q. If you have that portion the Illinois Central maintains within Minnesota?

A. The line that crosses the state line near Lyle and running up to Glenville is 18 point 75 miles and that line that crosses the southwest corner of the state between Rock Rapids and Sioux Falls is within the state for a distance of 11 and 4 tenths miles.

Q. Are these two lines to which you have now referred the only part of the Dubuque & Sioux City R. R. in the state of Minnesota?

A. That is all of the owned line in the State of Minnesota. There is a short piece of mileage that the Dubuque & Sioux City R. R. Co. leases or has track rights over between Glenville and Albert Lea, but that is a very short distance.

Q. Some five and a fraction miles?

A. Something—just about five and a fraction miles, yes, sir.

Q. Does the Illinois Central R. R. own any railroad in Minnesota?

[fol. 78] A. No, it does not.

Q. For the most part where is the remainder of the Dubuque & Sioux City R. R. Co.'s property?

A. In Iowa, and with a very small mileage in South Dakota.

Q. Is the Dubuque & Sioux City R. R. Co., an Iowa corporation?

A. Yes, sir.

Q. Is what you have said concerning the extent of the railroad of the Dubuque & Sioux City R. R. Co., true as to all of the years in question—1922 to 1929?

A. Yes, sir.

Q. Would you say that around 700 miles would be approximately the correct mileage of the Dubuque & Sioux City?

A. I would say so, yes, sir.

Defendent's Exhibit 10 marked:

Q. Calling your attention to Exhibit 10, of which you appear to have a copy, I will ask you to state what that is?

A. That is a tracer map of the railroad lines located within the State of Minnesota and showing the location of the various lines and, in particular, the line of the Dubuque & Sioux City R. R. Co., operated within Minnesota under the agency contract with the Illinois Central R. R. Co.

Q. Do you know whether that is the map traced from the railroad map of the Minnesota Railroad & Warehouse Commission?

A. Yes, sir, it is.

Q. Which is reduced in size?

[fol. 79] A. Yes, sir, in size.

Mr. Helsell: Defendants offer Exhibit No. 10.

Mr. Oehler: Objected to as immaterial and no bearing upon the issues. It is simply a duplication insofar as the defendant is concerned of Exhibit No. 9.

The Court: I think it may be received.

Q. Referring again to Exhibit No. 10, will you state what junctions in Minnesota there are of the Dubuque & Sioux City R. R. Co. with other railroads?

A. At Hills, Minn., we have a junction with the Great Northern Ry. At Glenville, Minn., with the Rock Island—Chicago, Rock Island & Pacific Ry. Co. At Lyle we have a junction with two other Minnesota railroads, the Chicago and Great Western and the Chicago, Milwaukee & St. Paul, now named the Chicago, Mil., St. Paul and Pacific R. R. Co. and at Albert Lea with the M. & St. L., or the Minneapolis & St. Louis and the Chicago Rock Island & Pacific and the Chicago, Milwaukee, St. Paul and Pacific, known as the Chicago, Milwaukee & St. Paul R. R. in the period under review.

Q. Now I will—

The Court: What was the second one?

A. The Minneapolis & St. Louis, The Chicago Rock Island & Pacific and the Milwaukee.

Defendant's Exhibit No. 11 marked.

Q. Now I call your attention to a map marked Defendant's Exhibit 11. Will you explain to the court what that is?

A. This is a map that is prepared at various times by a [fol. 80] firm in New York, working in conjunction with our employees in Chicago, the firm being H. H. Copeland & Son and is what we call a traffic density map prepared by investment houses, bankers—

Mr. Oehler: You have answered the question as to what it was.

Q. You may go ahead and tell what it purports to show?

A. —

Mr. Oehler: Object to that, incompetent, irrelevant and immaterial. The map is not in evidence.

Mr. Helsell: We offer it in evidence.

Mr. Oehler: We object to the map as being incompetent, irrelevant and immaterial.

The Court: What is it. What does it purport to show the trend of this interchange of traffic?

Mr. Helsell: The comparative density of traffic, yes, your honor. The trend of traffic.

Mr. Oehler: May I point out this map shows it only for the year 1923.

Mr. Helsell: We can only do one thing at a time, if the court please.

The Court: '23 is the year involved here?

Mr. Oehler: That is true.

The Court: I think it may be received.

Mr. Oehler: Exception.

Q. You may answer the question.

A. The purpose of the map is to show—

Mr. Oehler: I object to the witness testifying as to the purpose of the map.

[fol. 81] The Court: He may answer, as to what it shows. What does it show?

A. That map does show for the year 1923 the density of traffic for each portion of the lines of railroad of the Illinois Central system, including the line of the Dubuque & Sioux City R. R. Co., and including the line of the Dubuque & Sioux City R. R. in Minnesota, and the lines on each side of the railroad have an arrow pointing, indicating the direction in which the traffic for which the line on that side of the line indicates the traffic is moving. It also shows the density of traffic and the direction in which the traffic is moving, where it enters and comes out of Minnesota on the line of the Dubuque & Sioux City R. R. Co. Each fine line represents one hundred thousand net revenue and company tons hauled one mile per mile of road operated, and each dotted line fifty thousand, ten miles, net ton miles.

Defendant's Exhibit 12 marked.

Q. I call your attention to a map marked Defendant's Exhibit 12. Will you state what that is?

A. This exhibit—

Mr. Oehler: May the record show there is not the proper foundation. There has been nothing disclosed to show that this witness has prepared the map or has any knowledge whereof he testifies.

The Court: Very well, go ahead.

Q. You may answer the question?

A. This Exhibit affords the same information for the year 1928. That is to say, it indicates, or actually reflects the traffic density by divisions and direction, and each line [fol. 82] represents one hundred thousand net revenue and company tons hauled one mile per mile of road operated and each dotted line fifty thousand net ton miles. It also indicates similarly the line of the Dubuque & Sioux City R. R. Co. density traffic including that portion of the line located in the State of Minnesota. The arrows indicate the direction in which the traffic is moving.

Q. Where does the data used in compiling or preparing the map come from, if you know?

A. It was compiled in my office, or the offices under my supervision.

Q. Do you know that it was and is correct?

A. Yes, sir.

Q. Are these the only two years which you have such a map prepared—record?

A. During the years involved in this suit, these are the only two years. There has been one for—one year subsequent, 1931.

Defendant's Exhibit 13, marked.

Mr. Helsell: Defendant offers Exhibit 12.

Mr. Oehler: Same objection as before.

The Court: It may be received.

Mr. Oehler: Exception.

Q. Now, calling your attention to the paper which has been identified as Defendant's Exhibit 13, of which you appear to have a copy, will you state what that is?

A. This is an exact copy of the operating revenues and operating expenses. The railway tax accruals. Non operating income and the deductions from gross income and the

[fol. 83] net income, if any, of the Dubuque—Illinois Central R. R. Co., for the years 1922 to 1929 inclusive, as reported to the Interstate Commerce Commission.

Q. Do you find on that exhibit any item with reference to hire of freight cars?

A. Yes.

Q. Where is that found?

A. That is found for all years except 1924, under the Third item of deductions from gross income, operating account 536. Hire of freight cars—debit balance, whereas for the year 1924 it is shown under the title, Nonoperating income, open account 503. Hire of freight cars—credit balance.

Q. Was that exhibit prepared in your office?

A. Yes, sir.

Q. Do you know that it is correct?

A. I do.

Mr. Helsell: Defendant offers Exhibit 13.

Mr. Oehler: Objected to as incompetent, irrelevant and immaterial, no bearing on the issues of this case.

The Court: It may be received subject to the objection.

Mr. Oehler: Exception.

Q. Under the item, Hire of Freight Cars, the non-operating income item, what is the fact as reflected by this report as to whether or not there was any such income for the year 1924?

A. It reflects that the credits exceeded the debits for the year 1924 by \$795,360.

Q. Will you now—What is the fact as to this item in the other 7 years?

[fol. 84] A. In the other 7 years, in 1922 the debit item exceeded the credit item by \$95,674. In 1923 the debit item exceeded the credit item by \$1,327,898. In 1925 the debit item exceeded the credit item by \$340,722. In 1926 the debit item exceeded the credit item by \$1,306,986. In 1927 the debit item exceeded the credit item by \$2,275,061. In 1928 the debit item exceeded the credit item by \$1,183,686. In 1929 the debit item exceeded the credit item by \$1,278,976. The total of these figures, I would like to say, since they have been left out, as an unnecessary detail in this statement.

Q. So then, to summarize your last statement, is it true that for these 7 years the Illinois Central paid out for hire

of freight cars the amount, these amounts in excess of its receipts?

A. That is correct, yes, sir.

Q. Or in other words, the exchange of cars between the railroads and the Illinois Central R. R., has been that the Illinois Central has been necessitated to use a greater number of foreign cars than the foreign roads have used its cars.

A. Yes, the off-set of that is the amount that was paid out to the foreign roads for the use of their cars.

Q. You have used the term off-set, will you explain to the court how this final balance is determined?

A. Each road makes a report to the other for use of other cars. For instance, say that the New York Central Line use our cars to the extent of 100,000 days, this would be off-set [fol. 85] by 100,000 days of our use of their cars, and, if we use their cars to the extent of 125,000 days, then to the extent of the use of 100,000 of our cars there would be an off-set then, there would be an income to the New York Central resulting from our excessive use of their cars to the extent of \$25,000.

Q. What is the fact as to whether, during the years in question, '22 to '29, the Illinois Central R. R. Co. had more cars than it used for—or in the handling of traffic on its line?

A. —.

Mr. Oehler: Objected to as immaterial.

The Court: He may answer.

Mr. Oehler: Exception.

A. It did not, with the exception of the year 1924, the Illinois Central, in all of the years with the exception of 1924 required for its business more cars than was available on its line of railroad. Of course, if the Illinois Central did not have its own cars on the lines of other railroads, it would have had to use a less number of other companys' cars than it did. For that reason an off-set is provided of this character so as to permit cars to go through from one railroad to another.

Q. Do the cars of the Illinois Central R. R. Co. reach the State of Minnesota at points other than these junctions to which you have referred?

A. Yes, sir.

Q. Will you state to the court, illustrate how the cars get into the State at other points?

A. Well, I have given two illustrations. We will have a car, we will say, loaded in Indianapolis, Ind., move up over [fol. 86] our line to Chicago and delivered to the Chicago North Western at that point and moves to Omaha, Neb. on the Union Pacific and the O. W. R. & N. and Great Northern Ry. to Seattle and there unloaded. Under the rules the car must move back either loaded or empty in the direction to its home. The Great Northern has the car available for loading at Seattle and brings it across the states of Washington, Idaho, Montana, Minnesota and there transfers it to the Milwaukee Road or to the Chicago and North Western, as the case may be, and or on the Burlington, each one of those lines there brings it to Chicago where it is emptied and delivered back to us at that point. The second illustration would be where we have a car loaded, we will say at Macon, Ill., and bring it to Chicago where it is—where there are connections with the Chicago and North Western Ry. and the North Western takes it to Minneapolis, unloads it and brings it back empty to Chicago and returns it to us.

Q. Items of that character, that is, debits and credits, arrived at in this manner enter into the computation shown by this tabulation, the statement Exhibit No. 13?

A. Yes, sir, and many more like it.

Q. And those items reflecting debits and credits arising from the interchange of cars which reach the State of Minnesota, accrue, of course, to the movement of—over any part of the line in Minnesota?

A. That is correct.

[fol. 87] Q. Where it concerns the Dubuque & Sioux City, or the Illinois Central, what is the fact as to whether or not there were any per diem earnings of the Dubuque & Sioux City R. R. Co., during the years 1922 to 1929 inclusive?

A. The Dubuque & Sioux City R. R. Co. had no per diem earnings because it owns no freight cars.

Q. The cars which are operated on its line are secured in what manner?

A. They are secured from the Illinois Central in the same manner as any other railroad would secure a car for loading from the Illinois Central.

Q. And what is the arrangement with respect to the accounting, with respect to the compensation for the use of those cars, what is that?

A. —.

Mr. Oehler: Objected to as immaterial.

Mr. Helsell: I am trying to develop the fact that the Dubuque & Sioux City R. R. Co. pays their account between the companies, a sum for the use of the Illinois Central cars.

Mr. Oehler: The question, as I understand it, is that the Illinois Central cars that come into the state of Minnesota, the Dubuque & Sioux City owning no cars.

Mr. Helsell: Its the Illinois Central lease to the Dubuque & Sioux City that I am trying to show.

Mr. Oehler: The testimony is to the effect that the Illinois Central cars come into the state.

Mr. Helsell: I'll correct that as far as I can.

Mr. Oehler: He has testified that all of the cars of the Illinois Central coming in are not necessarily Dubuque & [fol. 88] Sioux City cars—that is, they don't necessarily come over the Dubuque & Sioux City. Your own witness testified cars came in where you have loads from the Pacific Coast.

The Court: I think he may show the system between the two roads.

Mr. Oehler: Exception. Objected to as not the best evidence. I assume that it refers to the cars in the lease?

A. Yes, sir, and I might add that the lease provides that the Dubuque & Sioux City takes care of the rental of any car that the Illinois Central turns over to the Dubuque & Sioux City in its operation. It provides for rental payment.

Q. Subject to the objection that the lease, of course, is the best evidence, will you explain, briefly, that arrangement, what it is?

A. —

Mr. Oehler: Same objection.

The Court: I think he may answer.

Mr. Oehler: Exception.

A. The lease provides that for such equipment as the Illinois Central may furnish to, or be on the line of the Dubuque & Sioux City R. R. Co., in connection with the operation of that line, rental shall be paid to the Illinois Central for use of that equipment.

Defendant's Exhibit No. 14 marked.

Q. Calling your attention to this paper marked Defendant's Exhibit 14, will you state what that is?

A. This exhibit shows the results of the operation of the Dubuque & Sioux City R. R. Co., in the State of Minnesota, as [fol. 89] reported to the Minnesota Railroad & Warehouse Commission, during the years 1922 to 1929 inclusive, and shows the amount of taxes that were paid on gross earnings in Minnesota in those years. It shows that for 1922—

Mr. Oehler: You have described that now, I object to any further statement.

Q. Were the figures shown on that statement compiled from the records in your office?

A. Yes, sir.

Q. You know them to be correct?

A. They are.

Q. Do you recall an examination made by the examiners for the State of Minnesota of our records and the returns of the company for the years 1923 to 1929 inclusive?

A. Yes, sir.

Q. When was that made?

A. In 1931.

Q. Calling your attention to Defendant's Exhibit 3, and the attached voucher, will you state what that represents?

A. That represents the results of the examination of the examiners for the state for the period—

Mr. Oehler: You were asked what it represents—

Q. Let's phrase it this way, what is it?

A. It's the receipt of the State Treasurer in payment of Auditor's draft, dated July 20, 1931, the draft being No. 59554 and states that it covers an unreported gross—

Mr. Oehler: Is that exhibit in evidence?
[fol. 90] The Court: Yes.

A. It covers the unreported gross earnings for the years '23 to '29, resulting in a tax of \$119.13. A penalty of \$11.91 and interest of \$29.54. The bill or draft or treasurer's receipt, or whatever it may be termed is against the Dubuque & Sioux City R. R. Co.

Q. Are you personally aware of the fact that such claim was made by the State examiners at that time?

A. Yes, sir. I interviewed them several times.

Q. Do you know to what extent these checks and audits were made at that time?

A. I can't say, but as I remember—

Mr. Oehler: Well, if you can't say—

Q. The attached voucher, or record portion of the voucher which is a part of this exhibit, does that show the amount of the items in question?

A. It does, yes, sir.

Q. And the date of that was in 1931, I believe?

A. Yes, sir.

Q. And at the time they were checking our records was anything—or was any claim made by the examiners, or was any claim made by the Tax Commission of Minnesota, that any other or different method of accounting, or method of making returns should be made by the Dubuque & Sioux City R. R. Co.?

A. —

Mr. Oehler: Objected to as immaterial.

The Court: He may answer.

Mr. Oehler: Exception.

[fol. 91] A. No, sir.

Q. Your attention is called to Defendant's Exhibit 2, which is a photostatic copy of the returns made by the Dubuque & Sioux City R. R. Co., for the years in question, the originals of which are shown by these 16 duplicates of the original reports, were those reports made under your supervision?

A. They were, yes, sir.

Q. Your attention is called to the instructions on the back of the reports. Were those instructions on the printed forms furnished by the Tax Commission of the State of Minnesota?

A. Yes, sir.

Q. Were those followed in making the report?

A. They were.

Q. That is true as to each of the semi-annual reports, 16 in number, for the years in question?

A. Yes, sir.

Q. Was there any change during that period in the instructions of the Tax Commission in respect to the reports, of the returns for the hire of equipment?

A. None.

Defendant's Exhibit No. 15 marked.

Q. Your attention is called to Exhibit 15. Will you state what that is?

A. This is a statement that was prepared—

Mr. Oehler: He asked you what it was.

The Court: That is what he started to tell.

A. It is a statement that was prepared for the purpose of showing the cost per box car based upon the average of all cars for the year 1927, and for cars that were purchased [fol. 92] in that year, in the series 176,000 to 176999, consisting of one thousand box cars, the average cost as shown, per car—

Mr. Oehler: I will object to that on the grounds the question was what the statement was, not the contents of it.

A. The statement shows—

Mr. Helsell: Defendant offers Defendant's Exhibit 15.

Mr. Oehler: Objected to as immaterial.

The Court: It may be received.

Mr. Oehler: Exception.

Q. Now, will you explain the exhibit and what it shows, if you please?

A. It shows for the year 1927, the average cost per day to own a car on the average, and also what it costs per day to own 1000 box cars purchased in 1927 in series 176,000-176,999 inclusive, and the average cost per day for the average of the cars \$1.05 and for the cars purchased in 1927 it is \$1.17.

Q. Were these figures compiled from the records in your office?

A. These—all of these figures were compiled from the records in my office with the exception that the maintenance cost which is for the average freight car for the year 1928 and represents the average cost for the United States as a whole. The tax and insurance applied at the rate of one and one-half per cent on the average price of cars is the result after applying it to the total equipment owned by all railroads in the United States and averaged to the average [fol. 93] car. The car accounting and transportation supervision and mechanical overhead, it all is figured on the average for the United States and as a whole.

Q. When was that study made?

A. This study was made in 1928 or 1927.

Q. In connection with other investigations?

A. Yes, for the purpose of finding out whether or not the average was approximate, or adequate with reference to the interchange of cars in the equalization of expenses between the railroads.

Q. During the progress of the trial, Mr. Bunting, there has been reference to a per diem charge of \$1 a day. Is that a charge of \$1 a day or is it a per diem, a day's credit or debit. When does it become an item involving money?

A. If one railroad uses our cars for 125,000 days in one month and we use their cars for 100,000 days in the same month, they would owe us \$25,000. It becomes a matter of dollars and cents after the offset is attained.

Q. Your attention is called to the second page of that statement being the special report of the examination of omitted gross earnings, identified as Exhibit 1. The first column is headed rentals from other lines for use of cars. This is for the year 1922. What does that item represent?

A. That represents an expression in dollars, the car days, that the Illinois Central's cars were on the lines of the railroads indicated.

Q. The third column has the caption, Minnesota Proportion. Is that a proportion which the examiners, in making this report, allocated to Minnesota business upon the per-[fol. 94] centages shown by the second column?

A. That is correct.

Mr. Helsell: There may be, if the court please, some uncertainty as to the extent to which we agreed this report is correct, and in order to avoid any misunderstanding as to that, or the extent of our admission we wish to definitely state at this time that it is our admission or agreement that Exhibit 1 correctly shows the amounts of the debits and credits and the percentages and computations made therefrom as to their mathematical correctness; and we do not—did not intend to admit or concede that the application of the figures or the application of the percentages was in accordance with the provisions of the statute.

Mr. Oehler: You admit, as I understand it, the figures contained in Exhibit No. 1 are correct, assuming they are based upon the proportions there. You admit the figures are correct, but you don't admit the theory upon which they are arrived at:

Mr. Beckett: The figures that we used.

Mr. Oehler: All right, they were used. In your theory it would be correct, the figures would then be correct?

Mr. Beckett: Yes.

Q. I call your attention again, Mr. Bunting, to the percentages of loaded freight car miles, Minnesota percentages, and ask you to state, if you know, how the examiners arrived at those percentages?

A. As I understand—

Mr. Oehler: Objected to as repetition. You went over [fol. 95] those with one witness. It was gone into fully and explained.

The Court: Not with this witness.

Mr. Oehler: By his own witness.

The Court: I don't think that prevents his getting the knowledge of this witness.

Mr. Oehler: The question asked was what somebody else had in their minds, as I take it. How they arrived at these figures.

The Court: Well, if he went over it with them he would be able to know, wouldn't he?

Mr. Oehler:

Q. Did you go over anything with these men, the examiners?

A. I went over all the figures, after they were submitted, with them. After they were submitted to me by the examiners.

The Court: We will let this witness tell what he knows, of his own knowledge, about it.

Mr. Helsell:

Q. Do you have in mind the question, Mr. Bunting?

A. —

Q. Do you know what basis the examiners, or the Tax Commission used in making this report, in arriving at those percentages for the State of Minnesota?

A. We will take the Great Northern for example. The Great Northern percentage, is assumed to be 36.48. That percentage represents the ratio of percentage of all the loaded freight car miles moving in the State of Minnesota for this year to the total loaded freight car miles moving over the entire system of the Great Northern Ry., in all of

[fol. 96] the states. It consists of, not only the Illinois Central cars, but all cars of lines in the state, operating in the State of Minnesota. All lines of railroad who own cars, that is, outside of the State of Minnesota, and who pay no tax to the State of Minnesota—

Mr. Oehler: I object to that and move it be stricken.

The Court: Well, if he knows—

A. And it contains the loaded car miles of a very large amount of ore car movements which has nothing at all to do with the operation of the Dubuque & Sioux City or the Illinois Central R. R. In fact it contains the movement of all cars of every character that move intrastate. It includes even the tank cars with reference to which, as I understand it, the tank car companies pay a tax, and private car lines of other cars. In other words it is the loaded freight car miles of all cars moving intrastate throughout this period. To illustrate, the road of the Great Northern and except where it was on a mileage basis, it was paid on a per diem basis, it is included here, and so far as the rental from other lines for use of cars is concerned, the percentage is derived from the loaded movement of all these cars regardless of classification.

Q. So that, put it this way: applying it to the case of the Dubuque & Sioux City R. R. Co., or the Illinois Central R. R., it is charged with credits alleged to have been received from the Great Northern Ry. Co., to the extent of 36 and 48 one-hundredths per cent of its total system loaded freight miles, is that right?

[fol. 97] A. Yes, sir.

Mr. Oehler: Objected to as leading.

The Court: What is the objection?

Mr. Oehler: He's putting the words in the witness's mouth.

The Court: It might be considered as leading.

Counsel and court confer. Off the record.

Mr. Helsell:

Q. Do you have any further answer to make to the question?

A. Yes.

Q. Will you state it?

A. —

Mr. Oehler: Objected to as not based on any question.

The Court: We are trying to get as much information as we can here. Let's not get too technical.

A. We have a percentage here for the purpose of ascertaining the hire of equipment. An element that is governed by time and not by loaded freight car movements because the hire of equipment applies whether the car is loaded or empty. To use the loaded freight car miles for the purpose of ascertaining the hire of equipment, with reference to empty cars, you can see you are using a basis that is improper. A second thing is, if the empty mileage in Minnesota, so far as the Great Northern is concerned with respect to its cars on other roads in Minnesota, is much greater than the loaded car miles and the result is you have a figure for an allocation between the roads that is absolutely incorrect. Furthermore, to use a percentage derived only from the loaded car miles does not reflect the true story, [fol. 98] even though that story were correct. To illustrate further, suppose that the loaded car miles in Minnesota on the Great Northern Ry. prove to be 85 percent Great Northern cars and 15 percent foreign cars, and that the loaded car miles, outside of Minnesota on the Great Northern Ry. is 60 percent Great Northern cars and 40 percent foreign cars, and that the percentage of all cars on the Great Northern, loaded car miles being 90 percent its own cars and only 10 percent foreign cars, yet the total cars being 36 percent of the total mileage of loaded cars over the entire system would mean that the other lines had been loosely assigned a hire of equipment in Minnesota that was untrue under the facts, if they had been fully established. The percentage indicates that the bigger the railroad, but smaller the mileage in Minnesota the greater the tax. The greater mileage in Minnesota for the same railroad would produce no tax even though it was using many more cars.

Q. In other words, as I understand you Mr. Bunting, if either the Dubuque & Sioux City R. R. Co., or the Illinois Central R. R. Co., had had half of its lines in Minnesota, did half of its business in Minnesota, if you multiplied its business many hundred fold, it would have to pay less in comparison than now?

A. That is correct.

Mr. Oehler: That is objected to. The witness has already answered the question.

The Court: It has been brought out by the witness to the same effect.

[fol. 99] Defendant's Exhibit 16, marked.

Q. Your attention is called to Defendant's Exhibit 16. Will you state what that is?

A. That is a statement that shows the average miles of road operated by the Illinois Central R. R. Co. for each of the years shown 1922 to 1929 inclusive, including the miles of railroad operated for the Dubuque & Sioux City under the agency contract.

Mr. Helsell: Defendant's Exhibit 16 is offered in evidence.

Mr. Oehler: Objected to as immaterial.

The Court: It may be received.

Mr. Oehler: Exception.

Defendant's Exhibit 17 marked.

Q. Your attention is called to a tabulated statement identified by the reporter as Exhibit No. 17. Will you state what that is?

A. That is a statement that has been prepared on the formula in use by the Tax Commission during the years 1922 to 1929 inclusive, confined to the roads operating in the State of Minnesota and shows the Minnesota proportion of freight car earnings, hire of freight equipment and the amount of taxes assignable thereto with respect to all of the hire of equipment of the Illinois Central R. R. Co., including the Dubuque & Sioux City R. R. Co. operations.

Q. Do you know whether that figure shown on this tabulated statement—the figures are correct?

A. They are.

Q. The first column is the years?

[fol. 100] A. Showing the years, 1922 to 1929 inclusive.

Q. The second column?

A. Shows the hire of freight cars, credit balance with roads operating in Minnesota, and is—was obtained on the formula that was used by the State in 1922 to 1929, with the exception that it eliminates all roads other than the Minnesota roads. And the ratio resulting from the freight car mileage in Minnesota bears to the freight car mileage

of the entire line of the Illinois Central R. R. Co. When I say the car mileage I mean the freight car revenue car mileage and the proportion of earnings assigned to Minnesota are indicated in the next column and the tax computation of five percent is shown in the last column over on the right hand side.

Q. Where reference is made to loaded freight car mileage that means, of course, the freight cars loaded with freight?

A. That is correct.

Q. Did the several roads operating in Minnesota, and the Dubuque & Sioux City R. R. Co., for these years make a return and pay to the State the gross earnings tax on the freight receipts from use of those cars?

A. I understand they did, yes, sir. I know the Dubuque & Sioux City did.

Mr. Helsell: You may cross examine.

Cross-examination.

Mr. Oehler:

Q. Are figures available showing the actual period of time that the Illinois Central cars were in Minnesota during the period involved in this suit, among the records of the other railroads, or in the records of the Illinois Central?

A. No, sir.

Q. Are figures available showing the period of time, per diem days or car rental days, as you designated them, that Illinois Central cars were in Minnesota for the years 1930 to 1934 inclusive?

A. The records will show that they were all—

Q. Can't you answer the question yes or no?

A. Generally speaking I would say that the records will indicate in our office as to whether or not they were in Minnesota or somewhere else.

Q. That doesn't quite answer the question. What I am attempting to find, and you can answer the question specifically, as to what you do know on that question?

A. The Minnesota records would indicate whether or not, in Minnesota or outside of Minnesota because their wheel reports will show the last location on any day. Where they

have moved or not, but so far as our records are concerned, we know, generally speaking, what terminal the car is in on any designated day. For instance, some cars may move across three different states in one day. That has happened a great many times, but our records would not indicate that. Our records merely show the terminal where it was at the time, at the close of time the report was made.

Q. To get back, are those records available, in your possession from—whereby the actual figures or tax could be computed based upon the car rental days in Minnesota?

[fol. 102] A. Generally speaking it would be some guess, and could be gotten by a long and exhaustive study.

Q. Are those figures not available?

A. I couldn't answer that in any other way than by saying that. We did make a study of one month. Some years ago and it took months and months and months to get the information and that it was not accurate after we got it.

Q. Then, in other words, an accurate figure, that is the figures of the time the Illinois Central cars are in Minnesota are not available even for the last five or six years?

A. No, sir.

Mr. Oehler: That is all.

Mr. Helsell: May the record show that the defendant offers in evidence all of the exhibits Nos. 1 to 17 inclusive.

Mr. Oehler: Objected to as incompetent, irrelevant and immaterial, not sufficient foundation laid.

The Court: Aside from that they are all right. They will be received.

Mr. Helsell: I think with perhaps the exception of offering this map, which has not as yet been marked, that may be our case, and if we may be permitted during the noon hour to check over our exhibits and records, we may resume then.

The Court: Very well.

12 o'clock. Noon recess.

2 p. m. Court convened.

Mr. Helsell: We will be through in a very few minutes.

[fol. 103] Mr. Oehler: I will be through almost immediately after that.

Mr. Helsell: Mr. Bunting.

MR. G. J. BUNTING, previously sworn as a witness on behalf of the Defendant, resumed the stand and testified as follows:

Re-direct examination.

Mr. Helsell:

Q. Your attention is called to a map marked Defendant's Exhibit 18. Will you state what that is?

Defendant's Exhibit 18 marked.

A. That is a map of the State of Minnesota, that has been traced in red to indicate the particular lines of railroad that resulted in taxes against them under the formula provided by the State. There are eight railroads in question, the Canadian National Ry., The Chicago Burlington & Quincy, the Chicago, Milwaukee St. Paul & Pacific, The Chicago & North Western, the Chicago, Rock Island & Pacific, the Duluth, South Shore & Atlantic, The Great Bay & Western, and the Dubuque & Sioux City, the Illinois Central operating it.

Mr. Helsell: Defendant offers in evidence Defendant's Exhibit 18.

Mr. Oehler: Objected to as immaterial.

The Court: It may be received.

Mr. Oehler: Exception.

Q. Mr. Bunting; in the light of your experience and ex[fol. 104] pert accounting, does the formula which is used by the state in computing its tax reflect with reasonable degree of accuracy the Minnesota proportion of freight car per diem earnings based upon the proportion of mileage within the state to the entire mileage upon which such business is done?

A. It does not.

Mr. Oehler: Objected to as calling for the conclusion of the witness. Invading the province of the court.

The Court: If he has any reasons he can give them. I think the answer may stand.

Q. What, in your opinion, is a method by which the Minnesota proportion of such gross earnings, if any, may be computed with reasonable accuracy?

A. —

Mr. Oehler: Same objection.

The Court: Same ruling.

Mr. Oehler: Exception.

A. The original formula used by the state, with the elimination of lines that do not operate in the state of Minnesota, applied to the lines, or so-called Minnesota lines, produce a result that, in my opinion, is fair and accurate so far as it can possibly be obtained in an equitable manner.

Q. Does Exhibit 17, a copy of which I hand you, show the computations under the formula which you have last referred as being reasonably accurate?

A. It does, yes, sir.

Mr. Helsell: That is all, you may cross examine.

[fol. 105] Re-cross examination.

Mr. Oehler:

Q. Now, under the formula you suggested which was the method of—by the M. & I. Co.—?

A. That is right.

Q. With the elimination of the roads not physically entering the State of Minnesota?

A. That is correct.

Q. And that is the system invoked then—it was to take the entire of—all returns from any source and then, if there were a credit balance apportioned to the State of Minnesota on a mileage basis—?

A. —.

Mr. Helsell: Object to that for the reason that the basis for the state formula here and so employed during the years in question is specified by the Tax Commission in the written instructions on the back of the report.

Mr. Oehler: I am just trying to—

The Court: I don't know whether the question was completed or not, was it?

Mr. Oehler: I will reframe it.

Q. What was the system invoked—on what system do you refer or method do you refer to that is proper, if the foreign lines are eliminated, explain that to the court?

A. It is taken—the net credits for hire of equipment between the Illinois Central RR Co., and the railroads that

operate in Minnesota and dividing that net credit between Minnesota and the other states involved on the basis that the net revenues, ton miles in Minnesota, bears to the total [fol. 106] ton miles in all states in which the Illinois Central system operates.

Q. That was the method employed prior to the decision in the Great Northern case—so-called—if I am correct and, or for the years 1908 to 1922?

A. —

Mr. Helsell: May I call attention to the answer in which you said ton miles, do you mean ton miles or car miles?

A. I meant the revenue—net revenue car miles, I should have said.

Q. That corrects it. Then that system was used by the roads in making returns on credit balances after the M&I case and until the Great Northern case? Were the railroads doing that?

A. Yes.

Q. What system or method was used in computing the per diem tax?

A. In the period of 1922 to 1929 there were no changes.

Q. Prior to that time what was the method?

A. I don't know. I wasn't with the Illinois Central system prior to 1922. I have no knowledge on that subject.

Mr. Oehler: That is all.

By Mr. Helsell:

Q. The formula to which you refer as being the most nearly accurate, is that in accordance with the instructions found on the back of the forms furnished by the Minnesota Tax Commission?

A. It is in accordance with that except that it eliminates the car hire of roads other than the Minnesota roads.

[fol. 107] Q. That is, it is applied only to the Minnesota Roads, is that correct?

A. Yes, sir.

Mr. Helsell: That is all.

(Witness excused.)

Mr. Helsell: The Defendant rests.

MR. AXEL L. BERGSTROM, previously sworn as a witness on behalf of the defendant, resumed the stand and testified as follows:

Redirect examination.

By Mr. Oehler:

Q. You have already been sworn, and your name is Axel L. Bergstrom?

A. Yes, sir.

Q. And you are employed in the State Comptroller's office?

A. Yes, sir.

Q. You have been in court during the entire hearing of this matter?

A. I have.

Q. And you just heard the witness Mr. Bunting testify as to various methods that were employed in making this tax?

A. Yes, sir.

Q. Now, just to go back into the history prior to the M and I—after the M & I case, what method was employed to determine credit balances on rental of equipment?

A. Well, the—all receipts were taken of all lines—roads being examined, the total disbursements, and if their credit [fol. 108] balances it was allotted as a tax on the basis of loaded freight car miles applied for the entire system of the road being examined—that is, it took into consideration the net earnings that accrued outside of the state of Minnesota.

Q. If the railroad operated outside of the State of Minnesota?

A. It did.

Q. And that method was invoked until what date, Mr. Bergstrom?

A. That was invoked in the Great Northern decision.

Q. And since the Great Northern decision no taxes, generally speaking, have been collected?

A. No, sir.

Mr. Oehler: That is all.

By Mr. Helsell:

Q. You say the formula used to determine the allotment to Minnesota, used the loaded freight car miles prior to the

Great Northern decision. Is that true or was it the revenue freight car miles?

A. It was the loaded freight car miles—

Q. I call your attention to Defendant's Exhibit 16, which is a duplicate report, and from the instructions found printed on the back, I will recall to your attention: "to the Minnesota proportion of said credit balances to be computed by applying the percent that the average revenue freight car miles, in Minnesota bore to the total average revenue freight car mileage of the entire system." Is that the system that was used?

A. Of the interstate business. The M & I case was re-[fol. 109] stricted to intrastate roads and the question of the allotment of the earnings based on interstate roads was ruled on by the Commission and our instructions were that loaded freight car miles in the State of Minnesota bore to the entire system would be the yard measure by which they applied it.

Q. You did not distinguish between loaded freight car miles and revenue freight car miles?

A. In this case we used the loaded freight car miles on things that would be affected until the Great Northern decision.

Q. Were these forms used prior to that time?

A. Yes, sir.

Q. Did you find the tax computation in accordance with the instructions on this form?

A. We found the computation in the loaded freight car mile basis.

Q. These are the only instructions that the State of Minnesota gave to the railroad in making their returns?

A. So far as I know.

Q. So far as you know these instructions found on the back of the forms,—the sample which I have called your attention to in Defendant's Exhibit 16,—were the only instructions given by the Tax Commission during all of these years, were they not?

A. Yes, sir.

Mr. Helsell: That is all.

(Witness excused.)

[fol. 110]

COLLOQUY

Mr. Helsell: Defendant rests. If the court wishes some points discussed, if not, we are willing that the case be submitted without argument. We will furnish counsel for the State with a copy of the brief and also the court.

The Court: Counsel can do just as they prefer.

Mr. Helsell: Will you furnish the court with a brief?

Mr. Oehler: I will do that, if the court please. I will file it almost immediately.

The Court: One point I want to call Mr. Oehler's attention to, that is the railroad's idea on it, on computing gross earnings and the law as I see it. There is only one feature where the relative mileage basis is employed—that is, in interstate commerce. The earnings are apportioned on a mileage basis in proportion to the length of haul, not the length of mileage. For instance a trainload here goes to Helena, Montana. A proportion of that haul is in Minnesota, is charged up as Minnesota earnings. For instance, in that 1,000 miles, 300 is in Minnesota. There would be three-tenths of that earnings allocated to Minnesota. It is not on the basis of the mileage of the entire system.

Mr. Oehler: That is true.

The Court: How can a carload basis be allocated on the basis of the Minnesota mileage compared to the entire system of line?

Mr. Oehler: Under the M. & I. case the railroad company kept actual track of where this car was. That will be a suggestion I will make to the court in lieu of adoption of [fol. 111] some of the formulas as these various so-called formulas have been adopted, as I understand it, primarily at the suggestion of the various roads avoiding the necessity of actual figures.

The Court: There is this feature of that, that in fairness must be considered, up until after all these years that you are claiming for now, the roads submitted reports in accordance with state instructions which did not call for keeping of any such records as you now say they ought to get.

The record was closed.

Filed Jan. 19, 1937.

(Here follows 1 photolithograph, Defendants Exhibit No. 2)

STATE OF

County of

Illinois
Cook

} ss.

being duly sworn, on oath says that he is the

E. J. Bunting
Comptroller

of the

Illinois Central Railroad Co., ~~successor of~~ *Dubuque & Sioux City R.R. company*, and

that the above abstract of the gross earnings of the

Dubuque & Sioux City

Railroad

Company, on the mileage operated in the

State of Minnesota for the six months ending

June 30,

192*2*, is true and correct and

that it embraces all the earnings of said road of whatever nature, as defined by Chapter 2, General Laws 1912.

{*Subd.*}

E. J. Bunting

Subscribed and sworn to before me this

Twelfth

day of

August

192*2*

{*Subd.*}

A. C. L. James

Notary Public

Laws of Minnesota under which this Return is to be made

CHAPTER 9—G. L. 1912

An Act providing for the taxation of railroad properties, the collection and times of payment of such tax and repealing acts inconsistent therewith.

Be it enacted by the Legislature of the State of Minnesota:

Five per cent tax on gross earnings of railroads.—How and when to be paid.

Section 1. Every railroad company owning or operating any line of railroad situated within, or partly within this state, shall, during the year 1913, and annually thereafter, pay into the treasury of this state, in lieu of all taxes and assessments, upon all property within this state, owned or operated for railway purposes, by such company, including equipment, appurtenances, appendages, and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state.

On or before August 15, 1913, and annually thereafter, each such railroad company shall make, according to law, a true and just return of all such gross earnings for the six months ending June 30th next preceding, and the said tax of five per centum thereon shall become due and be payable to the State of Minnesota in manner provided by law, on September 1st, next thereafter.

On or before February 15, 1914, and annually thereafter, each such railroad company shall make, according to law, a true and just return of all such gross earnings for the six months ending December 31st, next preceding, and said tax of five per centum thereon shall become due and payable to the State of Minnesota in manner provided by law, on March 1st next thereafter; and the payment of such sums at the times hereinbefore set forth shall be full and in lieu of all other taxes and assessments upon the property and franchises so taxed; provided nothing in this act shall be construed as modifying any agreement entered into between any municipality within the state and any railroad company relating to the payment of local taxes or assessments.

The lands acquired by public grant shall be and remain exempt from taxation until sold or contracted to be sold or conveyed as provided in the respective acts whereby such grants were made or recognized.

Construction of the term "gross earnings".—Sec. 2. The term "the gross earnings derived from the operation of such line of railway within this state," as used in Section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within the state to the entire mileage over which such business is done, or earnings on all interstate business passing through, into or out of the state.

Application and repeal of inconsistent acts.—Sec. 3. All acts and parts of acts not inconsistent herewith, regulating the payment, collection, time of payment, enforcement or reports involving the amount of taxes upon the gross earnings of railroad companies within this state or providing penalties for the non-payment of such taxes, are hereby made applicable to this act so far as may be, and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Enforcing of collection by civil action.—Sec. 4.—Upon failure to pay the amount of such taxes legally due, upon the respective dates hereinbefore set forth, collection thereof may be enforced in addition to existing remedies in a civil action brought in the name of the State of Minnesota in the district court of any county.

Railroad companies to pay taxes into the state treasury before commencement of contest.—Sec. 5. Before any railroad company shall be heard to contest or continue to contest the validity of this act or any part thereof such railroad company shall as a condition precedent thereto, pay into the treasury of the State of Minnesota the amount of taxes due or payable from such railroad company under the existing tax laws of this state.

Sec. 7. This act shall take effect and be in force from and after its passage.

Approved June 15, 1912. Ratified November 5, 1912.

CHAPTER 555—G. L. 1913

Sec. 9. Examination of gross earnings for taxation.—In like manner and with like powers, as provided by Section 3 hereof, the public examiner, at least once a year, so far as practicable, shall visit all railroad and other corporations and companies which are required by law to pay taxes to the state upon a gross earnings basis, examine their books of account and all other records and papers bearing upon or evidencing their gross earnings upon which the law, taxes should be paid in this state, and certify to the Minnesota tax commission the amount of such taxable earnings; and in case he shall discover errors and omissions in the gross earnings as reported by such companies, he shall certify the amount of such omitted earnings, together with the additional taxes and penalties due for collection as provided by law. All evasions and violations of the law in respect to such gross earnings taxes, which the public examiner may discover he shall report to the governor, the Minnesota tax commission and attorney general, and said officials shall institute such proceedings as the law and the public interest require.

Sec. 10. Subpoenas, witnesses, etc.—In all matters relating to his official duties, the examiner shall have the powers possessed by courts of law to issue subpoenas and cause them to be served and enforced. All state and county auditors, treasurers, and other public officials, and their respective deputies and employees, all officers, directors, and employees of all railway and other companies required by law to pay taxes to the state upon a gross earnings basis, and all persons having dealings with or knowledge of the affairs or methods of such companies, and likewise all corporations, firms and individuals having business involving the receipt, disbursement, or custody of the public funds shall at all times afford reasonable facilities for such examinations, make such returns and reports to the examiner as he may require, attend and answer under oath his lawful inquiries, produce and exhibit such books, accounts, documents, and property as he may desire to inspect, and in all things aid him in the performance of his duties.

Sec. 11. Refusal, obstruction, etc.—Every person who shall refuse or neglect to obey any lawful direction of the examiner, or his deputy, or any of his assistants; withhold any information, book, record, paper, or other thing called for by him for the purpose of examination; willfully obstruct or mislead him in the execution of his duties; or swear falsely concerning any matter stated under oath, shall be guilty of a felony, the minimum penalty whereof shall be a fine of one thousand dollars, or imprisonment in the state prison for one year.

CHAPTER 457—G. L. 1913

An Act to provide for the administration and enforcement of the gross earnings tax laws and to define the duties of state officials with reference thereto; providing for a system of accounting, reporting and recording taxable gross earnings, prescribing penalties for failure to report such earnings and pay taxes thereon, and repealing acts and parts of acts inconsistent herewith.

Be it enacted by the Legislature of the State of Minnesota:

Sec. 1. Date and form of gross earnings reports.—On or before February 1st of each year, every company, joint stock association, co-partnership, corporation or individual, required by law to pay taxes to the state upon a gross earnings basis shall make and furnish an itemized statement to the Minnesota tax commission, and a duplicate to the public examiner in such form as the public examiner, with the approval of the tax commission, shall prescribe, containing a true and just report of the gross earnings for and during the year ending December 31st preceding, verified by the president, secretary, treasurer, individual owner, or chief agent of such company, in this state; provided, that railroad companies shall make semi-annual reports as provided in Chapter 9 of the General Laws of the Special Session of 1912.

Such gross earnings shall be computed in accordance with the method prescribed by law.

Sec. 2. Assessment and collection of gross earnings taxes.—The Minnesota tax commission shall keep a permanent file of such gross earnings reports, inspect and verify each report and assess the earnings as shown thereon with the amount of taxes due, and certify the amount of such earnings and taxes to the state auditor, who thereupon shall make his draft on such company, joint stock association, co-partnership, corporation, or individual, for the amount of taxes due as thus certified, and place said draft in the hands of the state treasurer for collection.

Sec. 3. Penalty for failure to pay gross earnings tax.—If any such company, joint stock association, co-partnership, corporation, or individual, shall fail to pay such tax or gross earnings percentage by March 1st, (or, if a railway company, subject to semi-annual payment by March 1, and September 1, respectively, as provided by law), a penalty of ten per cent thereof shall immediately accrue, and thereafter one per cent for each month after the same becomes delinquent March 1st or September 1st, while such tax remains unpaid; provided, that any sum or sums due the state from such gross earnings taxes at the time of the passage of this act, or from penalties heretofore accruing, shall bear an interest penalty of one per cent per month from the date hereof until paid.

Sec. 4. When company fails to report, tax commission to fix amount of earnings.—If any such company, joint stock association, co-partnership, corporation, or individual fails to make and file such gross earnings report the Minnesota tax commission shall notify such company of such neglect or default, and if such default continue for thirty days after service of such notice, the tax commission shall notify the public examiner of such default, who shall examine the records of such company and report to the tax commission, for official entry in its books, his findings of such company's taxable earnings. Thereupon the tax commission, upon the basis of such findings and such other evidence as the commission may possess, shall fix the amount of such gross earnings and assess the tax thereon and the accruing penalties making official entry thereof and certify the amount thereof, together with the penalty, to the state auditor who shall proceed as in Section 2 hereof. Such entry shall stand in place of the report required by law to be made by such company, joint stock association, co-partnership, corporation, or individual, and the same or a certified copy thereof, shall, in all the courts of the state, for all purposes, be prima facie evidence of the correctness and validity of such gross earnings and of such tax and penalties, and the liability of such company therefor.

Sec. 5. Delinquent tax and penalties are a lien on the property.—Such delinquent and unpaid tax and penalties, assessed and certified by the Minnesota tax commission, as provided in Sections 3 and 4 hereof, shall be a lien upon all and singular, the property, estate and effects of any such company, joint stock association, co-partnership, corporation, or individual, and shall take precedence of all demands and judgments against the same; and the certificate of the Minnesota tax commission that said tax and penalties are due and unpaid, and the unpaid draft of the state auditor issued in pursuance thereof, shall be sufficient warrant for the attorney general to institute proceedings for the collection of said tax and penalties by sale of such property or otherwise.

Sec. 6. System of gross earnings accounts.—The public examiner, with the approval of the tax commission, shall have authority and power to prescribe for such companies, joint stock associations, co-partnerships, corporations, or individuals a system of gross earnings accounts, that shall be uniform for each class of companies, and he shall supervise the method of keeping such accounts; provided, that such system shall conform as nearly as practicable with that prescribed for such companies by the United States government.

Sec. 7. Violations of law, and errors and omissions of gross earnings.—Any evasions and violations of the gross earnings tax laws, which the public examiner may discover as a result of his examination of the books, records and taxation reports of such companies, shall be reported by him to the governor, and a transcript shall be filed and a detailed report thereof containing a summary of all errors and omissions of taxable gross earnings shall be filed by the examiner with the Minnesota tax commission forthwith, and the tax commission shall proceed as under Section 4 hereof to assess omitted earnings for additional taxes and penalties and report to the attorney general such violations of law, and the attorney general shall institute such proceedings as may be required to secure compliance with the law and the recovery of public revenue.

Sec. 9. Repeal of conflicting provisions.—Chapter 504 of the General Laws of 1909, Sections 1009 and 1020 of the Revised Laws of 1905, and all other acts and parts of acts inconsistent herewith, are hereby repealed.

Sec. 10. This act shall take effect and be in force from and after its passage.

Approved April 24, 1913.

CHAPTER 226—G. L. 1909

AN ACT requiring the preservation of records of all companies, joint stock associations, co-partnerships, corporations, or individuals required by law to pay taxes to the state upon a gross earnings basis, and prescribing a penalty for the destruction or mutilation of such documents.

Be it enacted by the Legislature of the State of Minnesota:

RECORDS, ETC., TO BE KEPT FOR SIX YEARS.—Sec. 1. That every person, company, joint stock association, co-partnership or corporation, required by law to pay taxes to the state upon a gross earnings basis, shall keep as a permanent file, and in such a manner as to make them easily accessible at all times for inspection by a properly accredited representative of the public examiner's department, or the railroad and warehouse commission, all books, records, documents, papers and statistics relating to such gross earnings, for at least six years subsequent to the date that such gross earnings tax returns have been rendered to the state.

WHAT MAY BE DESTROYED.—Sec. 2. Any detached papers subordinate to statements of gross earnings, or reports compiled in the accounting department, the full details of which are included in other statements or reports on file in as perfect a form, and which have been passed upon in a general examination by the special examiners or representatives of the state, but which have not reached the time limit prescribed in Section 1, may upon the recommendation of such special examiner or representatives, and written approval of the public examiner, be destroyed.

VIOLATION A GROSS MISDEMEANOR.—Sec. 3. Any person who shall willfully violate the provisions of this act, shall be deemed guilty of a gross misdemeanor.

Sec. 4. All other acts, or parts of acts, inconsistent with this act, are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its passage.

Approved April 19, 1909.

Return of Gross Earnings of the Dubuque & Sioux City
On Mileage Operated in the State of Iowa
for the six months ending June 30,

PRESCRIBED BY THE PUBLIC EXAMINER AND APPROVED BY THE

FIRST SEMI-ANNUAL REPORT TO BE FILED ON OR BEFORE AUGUST 15TH.

SECO

GROSS EARNINGS FROM	JANUARY	FEBRUARY	MARCH	APRIL	MAY	JUNE	JULY
1. Freight Revenue	737664	580849	847019	795278	989045	657064	
2. Switching Revenue	500	-	500	150	750		
3. Demurrage	800	100	1000	-	600	4100	
4. Storage-Freight	1934	390	150	555	175	897	
5. Milk Revenue	269	522	555	690	1347	1936	
6. Other Freight Train Revenue	-	-	-	-	-	-	
7. Passenger Revenue	203565	175621	204461	174720	137609	160052	
8. Excess Baggage Revenue	1463	1150	1643	1730	1467	1336	
9. Storage Baggage	-	-	-	-	-	-	
10. Other Passenger Train Revenue	87	98	90	2931	58	91	
11. Special Service Train Revenue	-	-	-	-	5244	-	
12. Sleeping Car Revenue	-	-	-	-	-	-	
13. Dining Cars, Hotels and Restaurants	-	-	-	-	-	-	
14. Parlor and Chair Car Revenue	-	-	-	-	-	-	
15. Mail Revenue	61198	61198	61198	61198	61198	61199	
16. Expre. Revenue	74424	74424	74424	74424	74424	74424	
17. Station and Train Privileges	95	122	168	273	255	187	
18. Parcel Room Receipts	-	-	-	-	-	-	
19. Telegraph Revenue	-	-	-	-	-	-	
20. Joint Facilities Revenue	-	-	-	-	-	-	
21. Miscellaneous Incidental Revenue	112	112	-	-	-	-	

Dubuque & Sioux City Railroad Company
Mileage Operated in the State of Minnesota

months ending June 30, 1922.

PRESCRIBED BY THE PUBLIC EXAMINER AND APPROVED BY THE MINNESOTA TAX COMMISSION

AUGUST 15TH.

SECOND SEMI-ANNUAL REPORT TO BE FILED ON OR BEFORE FEBRUARY 15TH.

MAY	JUNE	JULY	AUGUST	SEPTEMBER	OCTOBER	NOVEMBER	DECEMBER	TOTALS
989045	657064							4608919
750								1600
600	4100							6700
175	897							4121
1347	1936							5810
-	-							-
137609	160052							1056028
1467	1336							8789
-	-							-
58	91							2325
5244	-							5244
-	-							-
-	-							-
-	-							-
61198	61199							367190
74424	74424							446544
255	187							1050
-	-							-
-	-							-
-	-							-

16. Expre. Revenue	74424	74424	74424	74424	74424	74424
17. Station and Train Privileges	95	122	168	273	258	187
18. Parcel Room Receipts	-	-	-	-	-	-
19. Telegraph Revenue	-	-	-	-	-	-
20. Joint Facilities Revenue	-	-	-	-	-	-
21. Miscellaneous Incidental Revenue	112	112	-	-	-	-
HIRE OF EQUIPMENT						
22. (a) Credit balance freight cars in transportation service				4714		4714
23. (b) Credit balance passenger cars in transportation service				"	"	45693
24. (c) Credit balance locomotives in transportation service				"	"	12850
25. (d) Rentals for use of work equipment	-	-	-	-	-	-
26. Other items (itemised)	-	-	-	-	-	-
TOTALS	108481	89468	119179	111599	127197	106503

Total Gross Earnings received during the ^(FIRST)~~(SECOND)~~ six months

Tax on the same at five per cent

Remarks:

State.
Main Revenue

1st three months actual
last " " estimated
Difference will be adjusted
in next report.

44424	44424	446544
73	755	1050
-	-	-
-	-	-
-	-	-
-	-	224
4 Months	4714	4714
"	45693	45693
"	13850	13850
-	-	-
-	-	-
1271997	102503	6579320

Abstract of and notes on decision by Supreme Court of Minnesota relating to taxes on gross earnings. (State vs. Minnesota & International Ry. Co., 106 Minn. 176, 118 N. W. 679, 1007.)

Gross earnings of railroads.

"Gross earnings . . . are not limited to earnings derived from the operation of trains, but include all earnings received by such railway companies while performing work incidental to, or connected with, the business of transportation, and which may reasonably be considered within the scope of their corporate powers."

THE FOLLOWING ITEMS CONSTITUTE GROSS EARNINGS:

Switching cars for lumber companies.

"The amount received from lumber companies and other parties in moving, transferring and switching cars at loading works."
"Money received for services in loading cars for lumbermen cannot be distinguished upon the ground that the services were performed for the mere accommodation of shippers. It may be that the company might have required the shippers to do their own loading, but, under its charter, the company was authorized to load property received for transportation, and such work comes legitimately within the meaning of railroad business."

Rentals for use of work equipment.

"The amounts received for the use of the railway company's equipment, such as steam shovels, hoisting machinery, work trains, cars and engines, including crews."

"Cars, engines, hoists and general implements necessary to construct and keep railroads in repair cannot very well be kept constantly employed in the company's own work, and, when not so in use, the company should have the privilege of leasing them, and to furnish the necessary servants to handle the same, in order to earn an income therefrom, and unless such leasing or hiring would result in double taxation, the earnings from such sources may reasonably be considered a part of the earnings gained in the operation of the railroad."

"On work equipment you are to report for taxation the amounts you receive from other companies, or individuals, for the use of locomotives, freight cars, passenger cars, or work equipment used in construction or work service in Minnesota, and the gross earnings are to be localized to this state. Taxes are to be paid on the amounts received in these instances, and payments which you make to other companies or individuals for the use of their equipment in work service on your line is not to be taken into consideration. The Interstate Commerce classification of work equipment shall be followed as nearly as practicable, but in addition to items, included in said classification, you are to include receipts from freight or passenger cars which are used in work or construction service and not interchanged with foreign roads on the regular car mileage or per diem basis."

"Any collections for use of equipment in work service in any state in which your company does not own or operate any railroad, should be prorated, allowing Minnesota a proportion of the gross receipts, on the basis of the average main line operated mileage in this state."

Work trains in construction.

"Money received from other railway companies for the use of work trains employed in the service of construction work."

Rentals for use of equipment in transportation service.

"The amount received by the company for its cars employed in transportation in excess of the amount paid out by it for the use of cars of other companies."

"Where accounts are kept between different companies and charges are adjusted for such service, up to the point where accounts balance, the operation is a mere exchange of the use of the cars, but the amount received by any company for the use of its cars in excess of the amount paid out by it for the use of the cars of other companies is one of its sources of revenue earned by its rolling stock, and should be included in the gross earnings."

Note—You are to report to the State of Minnesota for taxation purposes, (a) the credit balance, if any, on freight equipment used in transportation service and interchanged with foreign roads on the per diem or mileage basis. Minnesota proportion of said credit balance to be computed by applying the percentage that the average revenue freight car mileage in Minnesota bears to the total average revenue freight car mileage of the entire line during the calendar year.

(b) The credit balance, if any, on passenger equipment used in transportation service and interchanged with foreign roads on the per diem or mileage basis. Minnesota proportion of said credit balance to be computed by applying the percentage that the average revenue passenger car mileage in Minnesota bears to the total average revenue passenger car mileage of the entire line during the calendar year.

(c) The credit balance, if any, on locomotives used in transportation service and interchanged with foreign railroads. Minnesota proportion of said credit balance to be computed by applying the percentage that the average locomotive mileage in Minnesota bears to the total average locomotive mileage of the entire line during the calendar year.

Note on division of dining car revenue.

From the receipts of dining cars may be deducted the cost of raw material used in preparation of meals—not including laundry, fuel, ice, etc.—and the balance should be apportioned on the basis that the mileage run by the car in Minnesota bears to the total mileage run by the car, over each "dining car run."

GROSS EARNINGS OF

Dubuque & Sioux City Railroad
(operated under lease of the Illinois Central)
RAILROAD COMPANY,

On mileage operated in the State of Minnesota.

For six months ending June 30, 1922.

OFFICE OF

MINNESOTA TAX COMMISSION

TO THE STATE AUDITOR OF THE STATE OF MINNESOTA:

The Minnesota Tax Commission does hereby certify that the within itemized statement was made to and filed with said Commission on

.....1922....
that the tax upon the gross earnings therein reported is five per cent, and that the amount due thereon is \$.....

Made and dated this.....

day of.....1922....

Minnesota Tax Commission

By.....
Chairman.

Attest:
.....
Secretary.

Auditor's Draft No.

\$....., Drawn

This Statement, when Completed, to be returned to the Office of the

Minnesota Tax Commission

and a Duplicate to the PUBLIC EXAMINER, State Capitol, St. Paul, on or before August 15th and February 15th of each year.

IN DISTRICT COURT OF RAMSEY COUNTY

STIPULATION FOR SETTLEMENT OF CASE—Filed Jan. 19, 1937

It is hereby stipulated, that the case, consisting of the "record of proceedings and testimony had on the trial", as corrected, and consisting of one hundred (100) pages of typewritten matter, and the exhibits therein referred to, may be taken as conformable to the truth, and as containing all the evidence offered or introduced on the trial of this cause, and also all objections, rulings, orders and all other proceedings of such trial, and that the same may be settled and allowed as the settled case herein by the Hon. James C. [fol. 112] Michael, without notice.

December 30, 1936.

William S. Ervin, Attorney General, Harry W. Oehler, Deputy Attorney General, Attorneys for Plaintiff. Doherty, Rumble & Butler, R. C. Beckett, Chas. A. Helsell, Attorneys for Defendant.

IN DISTRICT COURT OF RAMSEY COUNTY

ORDER SETTLING CASE—Filed Jan. 19, 1937

Upon the foregoing stipulation, I hereby certify that the foregoing case, consisting of the "record of proceedings and testimony had on the trial" and consisting of one hundred (100) pages of typewritten matter, and exhibits therein referred to, is conformable to the truth, and contains all the evidence offered or introduced on the trial of this cause, and all objections, rulings, and orders and all other proceedings of such trial and I hereby settle and allow the same as the settled case therein.

Dated Jan. 19, 1937.

James C. Michael, District Judge.

[fol. 113] IN DISTRICT COURT OF RAMSEY COUNTY

FINDINGS OF FACT, AND CONCLUSIONS OF LAW

The above entitled cause duly came on for trial before the Court, without a jury, on June 17, 1935, and was finally

submitted on briefs on September 23, 1935. Mr. Harry W. Oehler, Assistant Attorney General, appeared as attorney for the plaintiff, Messrs. R. C. Beckett and Charles A. Helsell, of 135 East 11th Place, Chicago, Illinois, and Messrs. Doherty, Rumble & Butler, of St. Paul, appeared as attorneys for the defendant.

Now, after hearing and considering the testimony and the arguments of counsel, the Court finds as Facts:

1. During all the times here involved the defendant Illinois Central Railroad Company has been and is a foreign railroad corporation organized and existing under the laws of the State of Illinois, and during said time has operated as owner and lessee approximately five thousand miles of railroad trackage, extending into or through various states of the United States, but the defendant has never owned any railway trackage or terminals within the State of Minnesota.
2. The Dubuque and Sioux City Railroad Company, an Iowa corporation, during all the times here in question owned, and still owns, a line of railroad extending from Dubuque to Sioux City in the State of Iowa, with various branch [fol. 114] lines, making a total track mileage of approximately 765 miles. Two of said branch lines extend into the State of Minnesota for short distances, one in Rock County and the other in Mower and Freeborn Counties, with a total of only 30.15 miles of railroad trackage in Minnesota. The Dubuque and Sioux City Railroad Company has not since the year 1904 operated any of its said lines of railroad either within or without the State of Minnesota.
3. On July 1, 1904, said Dubuque and Sioux City Railroad Company leased to said defendant all of its said lines of railway and railroad properties, including that portion thereof in Minnesota, for the term of forty-seven years, which said lease is still in full force and effect. Immediately upon the execution of said lease the defendant entered into possession and control of all of said leased railway lines and properties and has ever since been in the possession and control thereof, and has constantly operated the same, including the said portions thereof in Minnesota. In operating said leased lines of railway the defendant has at all times furnished and used its own engines, cars and equipment of all kinds thereon, and has used and operated said

leased lines of railway in connection with and as a part of the defendant's general railroad system. During all the times here in question the defendant was operating lines of railroad entering and partially within the State of Minnesota.

4. In this action the State seeks to recover from the defendant the five per cent gross earnings taxes, amounting [fol. 115] to \$89,724.36, with interest and penalties, for alleged omitted and unreported gross earnings of the defendant for the years 1922 to 1929, both inclusive.

5. The alleged omitted gross earnings in this case arise out of debits and credits for exchange of freight cars, in interstate commerce, between the defendant and other railroads operating in Minnesota, pursuant to the universal contract among all railroads in the United States that the using road is charged one dollar per day per car, while in its possession, exclusive of the day upon which the car is received; settlement and payment to be made upon net credit balances. At stated intervals balances are arrived at and the owning road having a net balance in its favor is paid such balance only by the using road.

6. During the eight years here involved, the defendant had credits in its favor for per diem use of its cars by other Minnesota railroads operating in Minnesota, for use of its cars by them in Minnesota and in other states, amounting to \$17,427,862, and was debited in like manner for use by the defendant on its system of cars belonging to other railroads operating in Minnesota and other states, during the same period, in the aggregate sum of \$14,924,508, leaving a net credit balance in favor of the defendant of \$2,503,353. The defendant is entitled to system balances with the other railroads operating in Minnesota, but the State authorities in assessing the taxes here sought to be collected failed to allow or take into account any system balances.

[fol. 116] 7. The defendant's aforesaid credit balance of \$2,503,353 arose from use of defendant's freight cars by other Minnesota operating railroads in Minnesota as well as in other states, and the more difficult problem is presented as to what part of this credit balance is to be apportioned as Minnesota earnings, and what is an equitable basis for such apportionment.

8. During the years in question, the defendant did not own any railway trackage in Minnesota and claimed that it operated the Dubuque and Sioux City Railroad Company road only as agent of that company, consequently the defendant made no reports of the gross earnings of its system to this State, and no such reports were asked or demanded by the taxing authorities of this State until the year 1933. The defendant, however, did during said eight-year period, cause reports of gross earnings to be made each six months to this State by said Dubuque and Sioux City Railroad Company, as a separate unit, but not as a part of the defendant's general railway system, and paid the taxes thereon. The State does not question these reports, but these reports contained no car rental items, for that road owned no cars.

9. The defendant's records which would show the number of days its freight cars were in possession of other Minnesota roads, in Minnesota during said eight-year period, were, pursuant to the rules of the Interstate Commerce Commission, destroyed by defendant before this controversy arose, so that the number of car days to be apportioned to [fol. 117] Minnesota cannot be determined to a mathematical certainty. In the absence of these records, the Minnesota taxing authorities adopted and applied a formula of determining the Minnesota proportion of the defendant's said credit balance, by applying to the credit balance the proportion of the total loaded freight car mileage of the using railroad operated by it in Minnesota (e. g. If the total loaded freight car mileage of the using road was 1,000,000 miles and 100,000 miles of this was in Minnesota, then ten per cent of the credit balance would be apportioned in Minnesota). Applying this formula to the defendant's credit balance over said period of eight years, with the other railroads operating in Minnesota, it gives an average of 10.39 per cent of said credit balance of \$2,503,353 or \$260,088, to be apportioned as Minnesota earnings, from which, applying the same formula to defendant's loaded freight car mileage to the credit balance of \$2,503,353, the defendant is entitled to a deduction therefrom of .11 of one per cent, or \$2,753, leaving a net taxable balance of \$257,350 against the defendant.

10. The above formula is approved and adopted because in the absence of the records it is believed to afford the

nearest known approach to accuracy, and to furnish approximately correct results.

11. This action was begun July 19, 1933.

12. Except as above stated, the allegations of the pleadings are not sustained by the evidence.

As Conclusions of Law, it is determined:

[fol. 118] That the plaintiff, the State of Minnesota, recover from the defendant, the Illinois Central Railroad Company, the sum of \$12,866.50, with interest thereon at the rate of six per cent per annum since July 19, 1933, together with costs and disbursements herein.

Dated October 24, 1935.

James Michael, District Judge.

Entry of judgment is stayed for 40 days.

Michael, J.

IN DISTRICT COURT OF RAMSEY COUNTY

MEMORANDUM—Filed Oct. 24, 1935

1. The defendant Illinois Central Railroad Company owns no railroad trackage in Minnesota, but it holds a lease of the road of the Dubuque and Sioux City Railroad Company which has trackage in Minnesota, and the defendant operates the trackage of the Dubuque and Sioux City R. R. Co. as a part of and in connection with the defendant's general railway system, furnishing all of its own engines, cars and equipment necessary for such operation. The defendant contends that it is not operating the trackage of the Dubuque and Sioux City R. R. Co. in its own right, but only as the agent of the lessor company. The lease in question is in evidence as Defendant's Exhibit V, and it seems to me the lease on its face clearly refutes the defendant's claim of agency. By the lease the possession, management, control, operation and upkeep of the trackage of the lessor company passes to the defendant. No right [fol. 119] of supervision, direction or control is reserved in the lessor company, hence the essential elements of an agency contract are lacking. The amount of the rental or the manner of its payment does not aid defendant's contention. The case of State vs. N. P. Ry. Co., 130 Minn. 377,

relied on by defendant on this point, is based upon a very different state of facts from the instant case and does not seem to be in point.

2. The second important question arises out of the conflicting contentions of the parties as to the correct apportionment to Minnesota of credit balances in defendant's favor for loan or exchange of freight cars between the defendant and other railroads operating in Minnesota, bearing in mind that of other railroads operating in this state, by far the greater part of their track mileage is outside of Minnesota. There is no dispute in the evidence of the total debits and credits for exchange of equipment during the years in question between the defendant on its entire system and the other Minnesota roads on their entire systems, both within and without this State. The defendant's total credits for the entire systems of other roads operating in Minnesota is \$17,427,861, and the defendant's corresponding debits for use on its system of cars belonging to other Minnesota operating roads, is \$14,924,508, leaving a net credit balance of \$2,503,353. For the purpose of determining the Minnesota proportion of these debits and credits, respectively, the State taxing authorities applied the formula described in the findings to the total amount of [fol. 120] both debits and credits, without allowing any system balance, instead of applying it to only the net credit balance, as they should have done.

It appears to be the settled rule in this State that net credit balances only are taxable as gross earnings, for up to the point of striking a balance there is no money transaction at all. *State vs. M. & I. Ry. Co.*, 106 Minn. 176. This rule is again reaffirmed in *State vs. G. N. Ry. Co.*, 163 Minn. 88.

It would seem that the State must abide by one or the other of two conditions:

First, the defendant owns no trackage in this State, and if it is operating in this State only as the agent of the lessor road, then it is not subject to taxes at all.

Second: But if, as we believe, the defendant is operating, on its own account, a railroad located partly in this State, then it follows that the defendant is entitled to offset its system debits against its credits from other systems operating in this State.

There is nothing to the contrary in the case of *State vs. G. N. Ry. Co.*, 163 Minn. 88, for that case was dealing with

credits earned on a foreign railroad, not operating in this State.

3. It remains to make proper apportionment to Minnesota of its share of the defendant's net credit balance of \$2,503,353, which was earned for use of defendant's cars by roads operating in Minnesota, on their systems in Minnesota and other states.

[fol. 121] As stated in the findings, the defendant's records which would show the number of days the defendant's cars were in use in Minnesota (as well as in any other state) have been destroyed. This of necessity compels resort to some other method of making the apportionment, for it is not believed the defendant may claim immunity simply because of the absence of the records. The problem is to find some other reasonably fair basis of apportionment. The formula adopted by the State, as set forth in the findings, may be somewhat artificial, but seems to produce approximately correct results, and it is not believed to work any injustice to the defendant. While the defendant objects to this formula as unwarranted and arbitrary, yet it fails to suggest or point out any other or better method of apportionment.

4. The defendant contends that these credit balances arising out of a charge of one dollar per day per car are not earnings at all within the purview of the gross earnings tax law, but that it represents only the per diem cost of ownership and repair of the cars. In order to arrive at this result, the evidence shows that defendant includes interest on the purchase price of the car as well as current repairs. We know of no authority for deducting these items from gross earnings, besides, as already pointed out, the taxability of credit balances for exchange of equipment is no longer an open question in this State.

5. The defendant argues at some length on supposed Federal questions in the case. With no intention of slighting [fol. 122] counsel's argument, the Court will briefly add, that it is not believed the facts and law as applied in this case present any Federal question.

The defendant operates a railroad in this State, and this action is simply to collect taxes on the credit balance or net earnings of its cars on other roads, within this State.

Michael, J.

IN DISTRICT COURT OF RAMSEY COUNTY

PLAINTIFF'S ALTERNATIVE MOTION FOR AMENDED FINDINGS,
ETC.—Filed November 21, 1935

To: R. C. Beckett, Charles A. Helsell and Messrs. Doherty,
Rumble & Butler, E-1006 First National Bank Building,
St. Paul, Minnesota, Attorneys for Defendant:

Take Notice that upon all the files, exhibits, records and proceedings heretofore had herein, and upon the minutes of the Court taken at the trial of the above entitled action, the plaintiff will move the Court, as a special term thereof, to be held in the Court House in the City of St. Paul, Ramsey County, Minnesota, on November 30, 1935, at 10:00 o'clock A. M. or as soon thereafter as counsel can be heard, for an order amending the findings of fact and conclusion of law, made and filed herein on October 24, 1935, in the following particulars:

[fol. 123] 1. Paragraph 5: By inserting after the word "in" in the second line thereof the words "Minnesota and in", and by inserting in the eighth line thereof and after the word "balances" the words "between each railroad".

2. Paragraph 6: By striking all thereof and substituting therefor the following: "During the eight years here involved, the defendant had credits and debits in its favor for per diem use of its cars by other Minnesota railroads operating in Minnesota, for the use of its cars by them in Minnesota and in other states. The defendant is entitled to have the formula hereinafter approved and adopted applied to system balances with other railroads operating in Minnesota, but the state authorities in assessing the taxes in the amount here sought to be collected failed to apply said formula to system balances but did apply said formula to system receipts and disbursements."

3. Paragraph 7: By striking all thereof.

4. Paragraph 9: By striking all thereof and substituting therefor the following: "The defendant kept no records which would show the number of days its freight cars were in possession of other Minnesota roads, and in Minnesota during said eight year period, so that the number of car days to be apportioned to Minnesota cannot be determined

to a mathematical certainty. To arrive at the figures set forth in the complaint herein, and in the absence of these records, the Minnesota taxing authorities adopted and applied [fol. 124] a formula for determining the Minnesota proportion of the defendant's car rentals as follows:

'Each road is charged with (a) that percentage of so-called "rentals from other lines for use of cars" determined by ascertaining the ratio or percentage, that each using Minnesota railroad's car miles bear to the entire car miles of such road.

'Each road is given credit for (b) only such ratio or percentage of so-called "payments to other lines for use of cars" as is determined by ascertaining the ratio of defendant's car miles in Minnesota to its entire system car miles.

'After thus apportioning the amount of credits and debits so computed, the net credits in excess of debits are ascertained and the statutory tax of five per cent applied to such net credits.'

(e. g. If the total loaded freight car miles of the using road was 1,000,000 miles and 100,000 miles of this use was in Minnesota, then ten per cent of the receipts would be apportioned in Minnesota).'

5. By adding and inserting the following finding: "The Minnesota taxing authorities applied the foregoing formula to the receipts and disbursements of the defendant and did not apply said foregoing formula to the system balances as they may have existed between the defendant and the other Minnesota railroads."

6. By adding and inserting the following finding: "The foregoing formula, applying the same to the system balances, instead of the receipts and disbursements of the defendant, and from figures available, results in a tax [fol. 125] against the defendant computed and detailed in exhibit "A" hereto attached and made a part hereof."

7. Amending the conclusion of law by striking therefrom the figure "\$12,866.50" and inserting in lieu thereof the following figure, to-wit: "\$26,414.59."

You will further take notice, that in default of the Court granting the foregoing motion the plaintiff will, at the same time and place move the said Court to vacate and set aside its order herein dated October 24, 1935, and grant

a new trial thereof for the reason that the findings of fact, as made by said Court, are not justified by the evidence in the case, and the conclusion of law and order for judgment therein are contrary to law.

Harry H. Peterson, Attorney General, Harry W. Oehler, Assistant Attorney General, Attorneys for Plaintiff, 102 State Capitol, St. Paul, Minnesota.

[fol. 126].

EXHIBIT "A" TO MOTION
Illinois Central Railroad Company
(Application of Burlington Formula)

Summary

Year	Minnesota Proportion of Credit Balances	Minnesota Proportion of Debits Balances	Net Credit Balance	Tax @ 5%
1922	\$95,359.49	\$237.43	\$95,122.06	\$4,756.10
1923	91,413.54	197.55	91,215.99	4,560.80
1924	89,432.09	350.27	89,081.82	4,454.09
1925	56,146.19	158.21	55,987.98	2,799.40
1926	30,544.42	197.18	30,347.24	1,517.36
1927	60,132.80	83.89	60,048.91	3,002.45
1928	57,495.76	100.97	57,394.79	2,869.74
1929	49,184.12	91.18	49,092.94	2,454.65
Total	\$529,708.41	\$1,416.68	\$528,291.73	\$26,414.59

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[ols. 127-128]

Illinois Central Railroad Company
(Application of Burlington Formula)

1922

Railroad	Rentals From Other Lines For Use of Cars	Payments to Other Lines For Use of Cars	Credit Balances From Hire of Freight Cars	Minnesota Per Cent Using Lines Freight Car Miles	Minnesota Proportion of Credit Balances	Debit Balances From Hire of Freight Cars	Minnesota Per Cent Owning Lines Freight Car Miles	Minnesota Proportion of Debit Balances
Canadian National Railway	\$19,192.60	\$19,809.90		.01		\$617.30	.11	\$.68
Chicago Great Western Railroad	137,041.41	136,953.15	\$88.26	13.06	\$11.53	123,191.13	"	135.51
Chicago Burlington & Quincy Railroad	414,494.01	537,685.14		.59			"	
Chicago Milwaukee St. Paul and Pacific Railroad	605,814.04	322,272.52	283,541.52	11.82	33,514.61		"	
Chicago and North Western Railway	564,333.01	438,011.17	126,321.84	3.88	4,901.29		"	
The Chicago Rock Island and Pacific Railway	450,396.73	326,750.78	123,645.95	2.30	2,843.86		"	
Chicago St. Paul, Minneapolis and Omaha Railway	53,284.35	67,576.99		30.08		14,292.64	"	15.72
Duluth & Iron Range	1,058.00	667.70	390.30	100.00	390.30		"	
Duluth, Missabe and Northern Railway	2,232.00	19.45	2,212.55	100.00	2,212.55		"	
Duluth & Northeastern Railroad	109.00		109.00	100.00	109.00		"	
The Duluth, South Shore & Atlantic Railway	3,696.65	5,080.00		.10		1,383.35	"	1.52
Duluth, Winnipeg and Pacific Railway	2,668.00	1,047.25	1,620.75	98.56	1,597.41		"	
Electric Short Line	276.00	446.65		100.00		170.65	"	.17
Great Northern Railway	101,744.37	149,732.60		36.48		47,988.23	"	52.79
Green Bay and Western Railroad	4,150.00	4,802.60		.30		652.60	"	.72
Minneapolis & St. Louis Railroad	193,691.11	84,521.21	109,169.90	32.42	35,392.88		"	
Minneapolis, St. Paul & Sault Ste. Marie Railway	116,681.70	74,328.65	42,353.05	29.29	12,405.21		"	
Minneapolis Northfield and Southern Railway	1,785.30	119.20	1,666.10	100.00	1,666.10		"	
Minnesota Dakota & Western Railway	309.00		309.00	100.00	309.00		"	
Minnesota Western Railroad	5.75		5.75	100.00	5.75		"	
Northern Pacific Railway	101,180.65	128,747.80		23.06		27,567.15	"	30.32
Total	\$2,774,143.68	\$2,298,572.76	\$691,433.97		\$95,359.49 Minus 237.43 \$95,122.06	\$215,863.05		\$237.43

[fols. 129-130]

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Illinois Central Railroad Company
(Application of Burlington Formula)

1923

Railroad	Rentals From Other Lines For Use of Cars	Payments to Other Lines For Use of Cars	Credit Balances From Hire of Freight Cars	Minnesota Per Cent Using Lines Freight Car Miles	Minnesota Proportion of Credit Balances	Debit Balances From Hire of Freight Cars	Minnesota Per Cent Owning Lines Freight Car Miles	Minnesota Proportion of Debit Balances
Canadian National Railway	\$97,820.95	\$120,981.95		.01		\$23,161.00	13	\$30.11
Chicago Great Western Railroad	119,576.51	200,363.96		13.54		80,787.45	"	105.02
Chicago Burlington & Quincy Railroad	471,808.52	504,931.64		.62		33,123.12	"	43.06
Chicago Milwaukee St. Paul and Pacific Railroad	610,979.48	448,349.84	\$162,629.64	.11.79	\$19,174.03		"	
Chicago and North Western Railway	626,840.69	573,082.41	53,758.28	3.81	2,048.19		"	
The Chicago Rock Island and Pacific Railway	490,089.64	320,134.47	169,955.17	2.20	3,739.01		"	
Chicago St. Paul, Minneapolis and Omaha Railway	73,372.64	82,700.75		28.96		9,328.11	"	12.13
Duluth & Iron Range	2,668.00	1,160.30	1,507.70	100.00	1,507.70		"	
Duluth, Missabe and Northern Railway	5,350.00	62.00	5,288.00	100.00	5,288.00		"	
Duluth & Northeastern Railroad	234.30		234.30	100.00	234.30		"	
The Duluth, South Shore & Atlantic Railway	7,683.40	9,732.00		.10		2,048.60	"	2.66
Duluth, Winnipeg and Pacific Railway	5,381.60	4,263.10	1,118.50	98.56	1,102.39		"	
Electric Short Line	1,026.00	1,219.05		100.00		193.05	"	.25
Great Northern Railway	204,540.58	175,529.85	29,010.73	34.92	10,130.55		"	
Green Bay and Western Railroad	5,384.00	8,703.80		.36		3,319.80	"	4.32
Minneapolis & St. Louis Railroad	141,850.69	84,349.66	57,501.03	32.48	18,676.33		"	
Minneapolis, St. Paul & Sault Ste. Marie Railway	187,410.86	100,666.85	86,744.01	28.20	24,461.81		"	
Minneapolis Northfield and Southern Railway	1,835.45	191.00	1,644.45	100.00	1,644.45		"	
Minnesota Dakota & Western Railway	544.15		544.15	100.00	544.15		"	
Minneapolis, Red Lake and Manitoba Railway	29.30		29.30	100.00	29.30		"	
Northern Pacific Railway	187,204.60	173,833.55	13,371.05	21.19	2,833.33		"	
Total	\$3,241,631.36	\$2,810,256.18	\$583,336.31		\$91,413.54 Minus 197.55	\$151,961.13		\$197.55
					\$91,215.99			

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Illinois Central Railroad Company
(Application of Burlington Formula)

1924

Railroad	Rentals From Other Lines For Use of Cars	Payments to Other Lines For Use of Cars	Credit Balances From Hire of Freight Cars	Minnesota Per Cent Using Lines Freight Car Miles	Minnesota Proportion of Credit Balances	Debit Balances From Hire of Freight Cars	Minnesota Per Cent Owning Lines Freight Car Miles	Minnesota Proportion of Debit Balances
Canadian National Railway	\$67,724.30	\$81,933.00		.01		\$14,208.70	.12	\$17.05
Chicago Great Western Railroad	83,891.19	185,575.15		14.85		101,683.96	"	122.02
Chicago Burlington & Quincy Railroad	380,905.21	357,576.36	\$23,328.85	.54	\$125.98		"	
Chicago Milwaukee St. Paul and Pacific Railroad	439,031.40	226,761.92	212,269.48	12.14	25,769.51		"	
Chicago and North Western Railway	461,203.97	356,845.01	104,358.96	4.03	4,205.67		"	
The Chicago Rock Island and Pacific Railway	60,548.27	232,091.56		2.35		171,543.29	"	205.85
Chicago St. Paul, Minneapolis and Omaha Railway	49,885.57	45,196.65	4,688.92	29.36	1,376.67		"	
Duluth & Iron Range	1,394.15	376.05	1,018.10	100.00	1,018.10		"	
Duluth, Missabe and Northern Railway	2,917.20	27.50	2,889.70	100.00	2,889.70		"	
Duluth & Northeastern Railroad	364.60		364.60	100.00	364.60		"	
The Duluth, South Shore & Atlantic Railway	3,998.35	2,479.05	1,519.30	10	1.52		"	
Duluth, Winnipeg and Pacific Railway	1,306.00	1,632.20		98.42		326.20	"	.39
Electric Short Line	267.30	172.60	94.70	100.00	94.70		"	
Great Northern Railway	94,749.38	79,171.72	15,577.66	35.21	5,484.89		"	
Green Bay and Western Railroad	3,729.52	3,501.20	228.32	.36	.82		"	
Minneapolis & St. Louis Railroad	96,535.23	51,285.58	45,249.65	33.32	15,077.18		"	
Minneapolis, St. Paul & Sault Ste. Marie Railway	157,681.21	46,002.75	111,678.46	27.40	30,599.90		"	
Minneapolis Northfield and Southern Railway	1,618.35	74.00	1,544.35	100.00	1,544.35		"	
Minnesota Dakota & Western Railway	663.00		663.00	100.00	663.00		"	
Minnesota Western Railroad	172.65	1.15	171.50	100.00	171.50		"	
Minneapolis, Red Lake and Manitoba Railway	44.00		44.00	100.00	44.00		"	
Northern Pacific Railway	98,132.90	102,268.33		23.09		4,135.43	"	4.96
Total	\$2,006,763.75	\$1,772,971.78	\$525,689.55		\$89,432.09	\$291,897.58		\$350.27
					Minus 350.27			
					\$89,081.82			

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Illinois Central Railroad Company
(Application of Burlington Formula)

1922

[fols. 133-134]

Railroad	Rentals From Other Lines For Use of Cars	Payments to Other Lines For Use of Cars	Credit Balances From Hire of Freight Cars	Minnesota Per Cent Using Lines Freight Car Miles	Minnesota Proportion of Credit Balances	Debit Balances From Hire of Freight Cars	Minnesota Per Cent Owning Lines Freight Car Miles	Minnesota Proportion of Debits Balances
Canadian National Railway	\$52,279.90	\$78,439.65		.01		\$26,159.75	.11	\$28.78
Chicago Great Western Railroad	78,052.78	171,457.04		14.01		93,404.26	"	102.74
Chicago, Burlington & Quincy Railroad	339,672.74	294,159.89	\$45,512.85	.70	\$318.59		"	
Chicago, Milwaukee, St. Paul and Pacific Railroad	353,929.69	228,426.13	125,503.56	13.40	16,817.57		"	
Chicago and North Western Railway	447,806.05	419,377.08	28,428.97	3.88	1,103.04		"	
The Chicago, Rock Island and Pacific Railway	283,422.87	198,370.77	85,052.10	2.47	2,100.79		"	
Chicago, St. Paul, Minneapolis and Omaha Railway	17,049.64	19,566.91		28.92		2,517.27	"	2.77
Duluth & Iron Range	1,069.00	492.00	577.00	100.00	577.00		"	
Duluth, Missabe and Northern Railway	1,765.00	10.00	1,755.00	100.00	1,755.00		"	
Duluth & Northeastern Railroad	125.15		125.15	100.00	125.15		"	
The Duluth, South Shore & Atlantic Railway	2,176.25	1,911.40	264.85	10	.26		"	
Duluth, Winnipeg and Pacific Railway	741.00	1,175.45		98.63		434.45	"	.48
Great Northern Railway	72,451.18	62,551.65	9,899.53	34.51	3,416.33		"	
Green Bay and Western Railroad	3,591.00	2,671.10	919.90	36	3.31		"	
Minneapolis & St. Louis Railroad	92,340.92	52,754.33	39,586.59	34.10	13,499.03		"	
Minneapolis, St. Paul & Sault Ste. Marie Railway	97,449.28	44,610.10	52,839.18	26.29	13,891.42		"	
Minneapolis Northfield and Southern Railway	2,009.30	191.00	1,818.30	100.00	1,818.30		"	
Minnesota Dakota & Western Railway	201.00		201.00	100.00	201.00		"	
Minnesota Western Railroad	513.40	12.00	501.40	100.00	501.40		"	
Minneapolis, Red Lake and Manitoba Railway	18.00		18.00	100.00	18.00		"	
Northern Pacific Railway	76,333.85	97,646.67		21.24		21,312.82	"	23.44
Total	\$1,922,998.00	\$1,673,823.17	\$393,003.38		\$56,146.19 Minus 158.21 \$55,987.98	\$143,828.55		\$158.21

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[fols. 135-136]

Illinois Central Railroad Company.

(Application of Burlington Formula)

— 1926 —

Railroad	Rentals From Other Lines For Use of Cars	Payments to Other Lines For Use of Cars	Credit Balances From Hire of Freight Cars	Minnesota Per Cent Using Lines Freight Car Miles	Minnesota Proportion of Credit Balances	Debit Balances From Hire of Freight Cars	Minnesota Per Cent Owning Lines Freight Car Miles	Minnesota Proportion of Debit Balances
Canadian National Railway.....	\$63,796.52	\$80,679.75		.01		\$16,883.23	.11	\$18.57
Chicago Great Western Railroad.....	80,361.06	167,569.99		14.18		87,208.93	"	95.93
Chicago Burlington & Quincy Railroad.....	297,950.15	299,674.39		.78	\$11,009.42	1,724.24	"	1.90
Chicago Milwaukee St. Paul and Pacific Railroad.....	337,677.40	251,464.22	\$86,213.18	12.77		22,854.29	"	25.14
Chicago and North Western Railway.....	434,389.89	457,244.18		3.21	2,443.59		"	
The Chicago Rock Island and Pacific Railway.....	313,289.21	208,444.20	104,875.01	2.33		170.00	"	.19
Duluth & Iron Range.....	495.00	665.00		100.00			"	
Duluth, Missabe and Northern Railway.....	1,488.60		1,488.60	100.00	1,488.60		"	
Duluth & Northeastern Railroad.....	109.00		109.00	100.00	109.60		"	
The Duluth, South Shore & Atlantic Railway.....	1,727.83	2,010.90		.10		283.07	"	.30
Duluth, Winnipeg and Pacific Railway.....	1,910.32	719.35	1,190.97	98.80	1,176.68		"	
Great Northern Railway Company.....	70,887.84	68,215.36	2,672.48	33.76	902.23		"	1.38
Green Bay and Western Railroad.....	3,147.47	4,397.85		.41		1,250.38	"	
Minneapolis & St. Louis Railroad.....	66,151.51	60,184.00	5,967.51	32.77	1,955.55		"	
Minneapolis, St. Paul & Sault Ste. Marie Railway.....	80,514.81	53,365.79	27,149.02	26.04	7,069.60		"	
Minneapolis Northfield and Southern Railway.....	3,277.78	250.00	3,027.78	100.00	3,027.28		"	
Minnesota Dakota & Western Railway.....	329.00	2.00	327.00	100.00	327.00		"	
Minnesota Western Railroad.....	998.15		998.15	100.00	998.15		"	
Minneapolis, Red Lake and Manitoba Railway.....	37.32		37.32	100.00	37.32		"	
Northern Pacific Railway.....	60,676.86	109,556.66		20.47		48,879.80	"	53.77
Total.....	\$1,819,215.72	\$1,764,413.64	\$234,056.02		\$30,544.42 Minus 197.18	\$179,253.94		\$197.18
					\$30,347.24			

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[fols. 137-138]

Illinois Central Railroad Company

(Application of Burlington Formula)

1927

Railroad	Rentals From Other Lines For Use of Cars	Payments to Other Lines For Use of Cars	Credit Balances From Hire of Freight Cars	Minnesota Per Cent Using Lines Freight Car Miles	Minnesota Proportion of Credit Balances	Debit Balances From Hire of Freight Cars	Minnesota Per Cent Owning Lines Freight Car Miles	Minnesota Proportion of Debit Balances
Canadian National Railway	\$56,404.68	\$61,769.35		.01		\$5,364.67	10	\$5.36
Chicago Great Western Railroad	102,432.13	146,086.55		14.93		43,654.42	"	43.65
Chicago, Burlington & Quincy Railroad	306,177.88	310,374.78		.75		4,196.90	"	4.20
Chicago, Milwaukee, St. Paul and Pacific Railroad	350,765.23	213,684.79	\$137,080.44	13.07	\$17,916.41		"	
Chicago and North Western Railway	485,208.53	394,392.62	90,815.91	3.32	3,015.09		"	
The Chicago, Rock Island and Pacific Railway	360,608.73	268,912.04	91,696.69	2.33	2,136.53		"	
Duluth & Iron Range	504.60	658.80		100.00		154.20	"	15
Duluth, Missabe and Northern Railway	1,593.92	113.00	1,480.92	100.00	1,480.92		"	
Duluth & Northeastern Railroad	142.00		142.00	100.00	142.00		"	
The Duluth, South Shore & Atlantic Railway	1,430.79	1,242.65	188.14	.10	.19		"	
Duluth, Winnipeg and Pacific Railway	976.83	547.15	429.68	98.57	423.54		"	
Great Northern Railway	63,228.71	53,996.73	9,231.98	34.33	3,139.64	785.84	"	79
Green Bay and Western Railroad	2,420.51	3,206.35		.34			"	
Minneapolis & St. Louis Railroad	92,654.30	48,980.68	43,673.62	33.39	14,582.62		"	
Minneapolis, St. Paul & Sault Ste. Marie Railway	97,765.02	45,410.53	52,354.49	27.10	14,188.07		"	
Minneapolis, Northfield and Southern Railway	1,620.25	106.00	1,514.25	100.00	1,514.25		"	
Minnesota Dakota & Western Railway	225.00	12.00	213.00	100.00	213.00		"	
Minnesota Western Railroad	1,345.54		1,345.54	100.00	1,345.54		"	
Minneapolis, Red Lake and Manitoba Railway	35.00		35.00	100.00	35.00		"	
Northern Pacific Railway	57,818.18	87,558.41		21.11		29,740.23	"	29.74
Total	\$1,983,357.83	\$1,637,052.43	\$430,201.66		\$60,132.80	\$83,896.26		\$83.89
					Minus 83.89			
					\$60,048.91			

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Illinois Central Railroad Company

(Application of Burlington Formula)

1928

[fol. 139-140]

Railroad	Rentals From Other Lines For Use of Cars	Payments to Other Lines For Use of Cars	Credit Balances From Hire of Freight Cars	Minnesota Per Cent Using Lines Freight Car Miles	Minnesota Proportion of Credit Balances	Debit Balances From Hire of Freight Cars	Minnesota Per Cent Owning Lines Freight Car Miles	Minnesota Proportion of Debit Balances
Canadian National Railway	\$70,260.87	\$58,909.20	\$11,351.67	.01	\$1.14	\$84,238.45	.10	\$84.24
Chicago Great Western Railroad	78,503.96	162,742.41		13.97			"	
Chicago, Burlington & Quincy Railroad	305,431.40	253,266.72	52,164.68	.70	365.15		"	
Chicago, Milwaukee, St. Paul and Pacific Railroad	333,468.36	214,746.00	118,722.36	13.07	15,517.01		"	
Chicago and North Western Railway	417,153.54	348,557.06	68,596.48	3.37	2,311.70		"	
The Chicago, Rock Island and Pacific Railway	294,161.73	190,146.15	104,015.58	2.47	2,569.18	471.70	"	.47
Duluth & Iron Range	297.60	769.30		100.00	793.25		"	
Duluth, Missabe and Northern Railway	1,389.25	596.00	793.25	100.00	168.00		"	
Duluth & Northeastern Railroad	168.00		168.00	100.00	.76		"	
The Duluth, South Shore & Atlantic Railway	1,807.11	1,048.90	758.21	.10	823.10		"	
Duluth, Winnipeg and Pacific Railway	1,222.72	387.00	835.72	98.49	3,168.99		"	
Great Northern Railway	60,456.09	50,654.08	9,802.01	32.33	9.57		"	
Green Bay and Western Railroad	5,177.21	2,277.20	2,900.01	.33	14,393.83		"	
Minneapolis & St. Louis Railroad	89,229.87	44,206.94	45,022.93	31.97	14,661.63		"	
Minneapolis, St. Paul & Sault Ste. Marie Railway	92,595.24	39,046.55	53,548.69	27.38	1,576.95		"	
Minneapolis Northfield and Southern Railway	1,639.10	62.15	1,576.95	100.00	191.00		"	
Minnesota Dakota & Western Railway	191.00		191.00	100.00	923.50		"	
Minnesota Western Railroad	931.50	8.00	923.50	100.00	21.00	16,257.01	"	16.26
Minneapolis, Red Lake and Manitoba Railway	21.00		21.00	100.00			"	
Northern Pacific Railway	69,982.27	86,239.28		21.11		\$100,967.16		\$100.97
Total	\$1,824,087.82	\$1,453,662.94	\$471,392.04		\$57,495.76 Minus 100.97			
					\$57,394.79			

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Illinois Central Railroad Company

(Application of Burlington Formula)

1929

[fols. 141-158]

Railroad	Rentals From Other Lines For Use of Cars	Payments to Other Lines For Use of Cars	Credit Balances From Hire of Freight Cars	Minnesota Per Cent Using Lines Freight Car Miles	Minnesota Proportion of Credit Balances	Debit Balances From Hire of Freight Cars	Minnesota Per Cent Owning Lines Freight Car Miles	Minnesota Proportion of Debit Balances
					\$.73		10	\$62.52
Canadian National Railway	\$65,086.12	\$57,755.10	\$7,331.02	.01		\$62,522.08	"	
Chicago Great Western Railroad	90,754.92	153,277.00		13.68	175.98		"	
Chicago Burlington & Quincy Railroad	295,319.42	270,250.31	25,069.11	.69	21,056.26		"	
Chicago Milwaukee St. Paul and Pacific Railroad	416,708.98	253,228.67	163,480.31	12.88	1,073.84		"	
Chicago and North Western Railway	391,951.01	358,705.14	33,245.87	3.23	3,218.69		"	.17
The Chicago Rock Island and Pacific Railway	320,928.09	190,616.82	130,311.27	2.47		169.74	"	
Duluth & Iron Range	249.56	419.30		100.00	626.66		"	
Duluth & Missabe and Northern Railway	1,638.66	1,012.00	626.66	100.00	258.50		"	
Duluth & Northeastern Railroad	258.50		258.50	100.00	.66		"	
The Duluth, South Shore & Atlantic Railway	1,618.72	959.15	659.57	10	1,161.75		"	
Duluth, Winnipeg and Pacific Railway	1,503.68	324.00	1,179.68	98.48	3,321.68		"	
Great Northern Railway	71,653.60	61,687.57	9,966.03	33.33	3.92		"	
Green Bay and Western Railroad	3,173.56	2,052.45	1,121.11	.35	3,539.14		"	
Minneapolis & St. Louis Railroad	55,109.84	44,132.35	10,977.49	32.24	12,665.59		"	
Minneapolis, St. Paul & Sault Ste. Marie Railway	86,072.98	39,284.68	46,788.30	27.07	1,382.16		"	
Minneapolis Northfield and Southern Railway	1,411.46	29.30	1,382.16	100.00	317.00		"	.01
Minnesota Dakota & Western Railway	317.00		317.00	100.00	381.56		"	
Minnesota Western Railroad	381.56		381.56	100.00		14.35	"	28.48
Minneapolis, Red Lake and Manitoba Railway	10.65	25.00		100.00		28,481.57	"	
Northern Pacific Railway	51,515.32	79,996.89		20.58		\$91,187.74		\$91.18
Total	\$1,855,663.63	\$1,513,755.73	\$433,095.64		\$49,184.12 Minus 91.18			
					\$49,092.94			

[fol. 159] IN DISTRICT COURT OF RAMSEY COUNTY

DEFENDANT'S ALTERNATIVE MOTION FOR AMENDED FINDINGS,
ETC.—Filed December 6, 1935

To: Harry H. Peterson, Attorney General; Harry W. Oehler, Assistant Attorney General, Attorneys for Plaintiff, 102 State Capitol, St. Paul, Minnesota.

Take notice that upon all the files, exhibits, records and proceedings heretofore had herein, and upon the minutes of the court taken at the trial of the above entitled action, the plaintiff will move the Court, at a special term thereof, to be held in the Court House in the City of St. Paul, Ramsey County, Minnesota, on December 7, 1935, at ten o'clock A. M., or as soon thereafter as counsel can be heard, for an order amending the findings of fact and conclusion of law, made and filed herein on October 24, 1935, in the following particulars:

1. Paragraph 8. By striking all thereof and substituting therefor the following: "That under the undisputed evidence it appears that the Railroad whose earnings are sought to be taxed is the property of the Dubuque & Sioux City Railroad Company, an Iowa corporation; that it is operated by the Illinois Central Railroad Company as Agent only; that its earnings are under the terms of the lease agreement solely those of the Dubuque & Sioux City Railroad [fol. 160] Company; that any deficit arising from the operation of said Railroad is a deficit assumed by the Dubuque & Sioux City Railroad Company; that the gross earnings tax must be under the terms of said agreement assessed against the Dubuque & Sioux City Railroad Company; that the defendant has made no report of its earnings in the State of Minnesota, but has reported as Agent of the Dubuque & Sioux City Railroad Company the earnings of that Company."

2. By adding a paragraph as follows: "That the earnings of the Dubuque & Sioux City Railroad Company, during the years in question, are as shown by the defendant's Exhibit No. XI, and that a proper accounting of the per diem gross earnings would be as shown by said Exhibit."

3. Paragraph 9. By striking all thereof and substituting the following: "The proportion of defendant's aforesaid

credit balance of \$2,503,353 which arose from the operation of the Dubuque & Sioux City Railroad in Minnesota is shown to be eleven one-hundredths of 1% which percentage applied to said earnings produces as the taxable gross earnings within the State of Minnesota the sum of \$2,753.00."

That by amending the Conclusion of Law by striking therefrom the figures \$12,866.50 and inserting in lieu thereof the following figures, to-wit, \$137.60.

You Will Further Take Notice, that in default of the Court granting the foregoing motion the plaintiff will, at [fol. 161] the same time and place, move the said Court to vacate and set aside its order herein dated October 24, 1935, and grant a new trial thereof for the reason that the findings of fact, as made by said Court, are not justified by the evidence in the case, and the conclusion of law and order for judgment therein are contrary to law.

Doherty, Rumble & Butler, E-1006 First National Bank Building, St. Paul, Minnesota. Charles A. Helsell, R. C. Beckett, 135 East 11th Place, Chicago, Ill., Attorneys for Defendant.

Served Nov. 29, 1935.

IN DISTRICT COURT OF RAMSEY COUNTY

ORDER DENYING MOTIONS FOR AMENDED FINDINGS, ETC.

After hearing Counsel, It Is Ordered:

1. That plaintiff's motion for amended findings, or for a new trial herein, be and the same is in all things, denied.
2. That defendant's motion for amended findings, or for a new trial herein, be and the same is in all things denied.

Dated December 27, 1935.

James C. Michael, District Judge.

Entry of Judgment is stayed for 20 days.

Michael, J.

[fol. 161-a] IN DISTRICT COURT OF RAMSEY COUNTY

MEMORANDUM

1. This motion on behalf of the plaintiff presents a clear attempt on the part of the State to shift its position, from

what it assumed in levying the taxes, in its complaint, and maintained throughout the trial.—

Defendant's Exhibit 1 presents the undisputed figures and method adopted by the taxing authorities in assessing the taxes sought to be collected.

The complaint is based wholly upon these figures and the method then employed of arriving at taxable credit balances.

On the trial testimony showed the exact formula used by the State in arriving at the results shown in defendant's Exhibit 1.

In the decision this Court adopted and followed the exact figures and formula furnished and advocated by the State, with the single exception that the Court allowed a system balance of debits and credits, before applying the formula to determine the Minnesota proportion of the credit balance.

This the State failed to do.

A comparison of the decision with the first page of defendant's Exhibit 1 and the complaint will show that the only difference, between what the State claimed and what it was awarded in the decision, was caused wholly by the allowance of the so-called system balance.

No other formula or basis of computation was mentioned or suggested at the trial by the State.

On this motion, for the first time, the State puts forth [fol. 161-b] by new assertion the so-called "Burlington formula", said to have been used in compromising another law suit.

This is no part of the record in this case, and even if it were, there are not sufficient facts and data in evidence to correctly apply it.

So far as the State is concerned it would appear that the only question involved is whether or not the Court erred in allowing the system balance, and even the "Burlington Formula" which we are now asked to adopt provides for that at the outset.

2. The defendant in its motion puts forth the suggestion, if it be conceded that its cars earned a credit balance of about \$260,000 on Minnesota trackage of other roads, that it should be taxed only on the proportion thereof which its Minnesota track mileage bears to the track mileage of its entire system, which would be about .6 of one per cent.

I can see no logical basis for such a theory.

In support of defendant's motion counsel, at some length, reargue the main questions in issue, but we are content to abide by the original decision and memorandum.

Michael, J.

[fol. 161-c] IN DISTRICT COURT OF RAMSEY COUNTY

JUDGMENT—Filed June 3, 1936

Pursuant to the Order for Judgment duly made in the above entitled action and filed on the 24th day of October, 1935.

Now, on motion of Harry H. Peterson and Harry W. Oehler, said Attorneys, It Is Hereby Adjudged that the Plaintiff herein recover of said Defendant Illinois Central Railroad Company the sum of Fifteen Thousand Eighty-five and 97/100 Dollars damages with Fifteen and 30/100 Dollars costs and disbursements, in all amounting to \$15,101.27.

Signed this 3rd day of June, A. D. 1936.

N. C. Robinson, Clerk. By A. B. White, Deputy Clerk.

(Recitals in the foregoing judgment are incorrect in so far as it is there stated that judgment was "on motion of Harry H. Peterson and Harry W. Oehler", as the judgment was entered upon the motion of the defendant.)

[fol. 161-d] IN DISTRICT COURT OF RAMSEY COUNTY

NOTICE OF APPEAL—Filed November 16, 1936

To: Doherty, Rumble & Butler, First National Bank Building, St. Paul, Minnesota. R. C. Beckett, 135 E. 11th Place, Chicago, Illinois. Chas. A. Helsell, 135 E. 11th Place, Chicago, Illinois, Attorneys for Defendant.

Please Take Notice, that the plaintiff appeals to the Supreme Court from the judgment and the whole thereof, entered herein on June 3, 1936.

Harry H. Peterson, Attorney General. Harry W. Oehler, Deputy Attorney General, Attorneys for Plaintiff, 102 State Capitol, St. Paul, Minnesota.

Service admitted Nov. 16, 1936.

[fol. 162] IN SUPREME COURT OF MINNESOTA, RAMSEY COUNTY

No. 142

[File endorsement omitted]

31216

STATE OF MINNESOTA, Appellant,

vs.

ILLINOIS CENTRAL RAILROAD Co., Respondent

Syllabus

STONE, J.:

1. For the purpose of determining (in the absence of original records) the amount of an interstate railroad's receipts from freight car rentals on which to reckon the Minnesota gross earnings tax, the factor of allocation is the extent of such use, (and the resulting revenue) in Minnesota. The computation may be made by allocating to Minnesota a per centum of each credit balance for such use, due the taxpayer from another railroad, equivalent to the per centum in Minnesota of the using line's entire loaded or revenue freight car mileage. From the total credits so computed and allocated to Minnesota is then to be deducted a per centum of each of the taxpayer's debit balances (owing by it to another line) equivalent to the per centum in Minnesota of its entire loaded freight car mileage. The sum so ascertained will be the amount of the earnings in question on which the gross earnings tax is to be computed.

2. In the levy and imposition of taxes the state acts in its sovereign capacity and hence, in an action for the collection thereof, cannot be subjected to an equitable estoppel.

Reversed.

[fol. 163] OPINION—Filed Sept. 10, 1937

STONE, Justice:

The state sues defendant for a five per cent gross earnings tax on income from freight car per diem rentals for a

period of eight years, 1922 to 1929, inclusive. The amount claimed was \$89,724.36. The state got judgment for \$12,866.50, from which it appeals.

1 Mason Minn. St. 1927, §2246, provides:

"Every railroad company owning or operating any line of railroad situated within or partly within this state, shall, . . . pay . . . in lieu of all taxes, upon all property within this state owned or operated for railway purposes, by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state."

Under §2247 "gross earnings" mean "all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings, on all interstate business passing through, into or out of the state."

Under the rule of *State v. Minnesota & International Ry. Co.* 106 Minn. 176, 118 N. W. 679, 1007, only the amount received by a railroad company operating in Minnesota, for use of its cars, in excess of what it pays for the use of cars of other companies is included in taxable gross earnings. In practice, accounts are kept between the railroad companies and system balances struck and settled monthly. Because Minnesota can tax no property beyond its own borders and because our gross earnings tax is a levy in lieu of all others on the Minnesota property of railroads operating here (1 Mason Minn. St. 1927, §2246), the incidence of the tax on car rentals is limited by the rule of *State v. G. N. Ry. Co.* 163 Minn. 88, 203 N. W. 453. That rule is this: In order to determine whether a credit balance for car rentals is to constitute gross earnings of the creditor road taxable in Minnesota, "all rentals derived from the use of the cars by companies operating no lines within the state must be excluded, and no more included of rentals from foreign companies extending into the state than the proportion earned from use within the state" of the creditor's cars.

It is of the theory of the case, implicit in the record, the decision below, and all argument here that, where interstate apportionment of car rentals is needful, it is to be made on the basis of "loaded freight car mileage" (for

brevity to be hereinafter indicated merely as mileage). On that basis, therefore, we consider and decide the case.

Defendant is a foreign railroad corporation organized under the laws of Illinois. Since 1904, it has operated, as lessee of the Dubuque & Sioux City Railroad, some 30.15 miles of trackage in Minnesota. Defendant has exchanged freight cars with other roads operating within and without Minnesota. Pursuant to the universal contract among all roads in the United States, the using road is charged one dollar per day per car while in its possession. During the involved eight years, defendant had credits in its favor for per diem use of its cars by other railroads amounting to \$17,427,861.79 and debits in the sum of \$14,924,508.63.

The Minnesota Tax Commission had promulgated rules and furnished printed forms for returns. The rules incorporated that of *State v. Minnesota & International Ry. Co.* 106 Minn. 176, 118 N. W. 679, 1007; together with the following:

“NOTE—You are to report to the State of Minnesota for taxation purposes, (a) the credit balance, if any, on freight equipment used in transportation service and interchanged with foreign roads on the per diem or mileage basis. Minnesota proportion of said credit balance to be computed by applying the percentage that the average revenue freight car mileage in Minnesota bears to the total average revenue freight car mileage of the entire line during the calendar year.”

[fol. 165] Made as so required, defendant duly filed returns for every year in controversy. All were accepted by the state, and defendant promptly paid the tax computed thereon. (Those returns used what is now referred to as “Defendant’s Formula.” Defendant modestly disclaims its authorship and refers to it as the state’s old formula).

In 1933 the Minnesota Tax Commission adopted a new theory. In the meantime, in the language of Judge Michael: “The defendant’s records which would show the number of days its freight cars were in possession of other Minnesota roads, in Minnesota during said eight-year period, were, pursuant to the rules of the Interstate Commerce Commission, destroyed by defendant before this controversy arose, so that the number of car days to be apportioned to Minnesota cannot be determined to a mathematical certainty.” That would be impossible in any event

because the best of practicable records would seldom if ever disclose just when or where a freight car crossed a state line. The most practicably possible is a record, approximately accurate, of the time freight cars are in use by lines other than the owner.

Upon the state's new formula this suit was based. It ignored the necessity for first getting system balances. Any credit to defendant, although on the system balance more than offset and defendant indebted to the other road, was sought to be taxed. By so much there was attempt to tax something not an earning. See *State v. Minnesota & International Ry. Co.* 106 Minn. 176, 118 N.W. 679, 1007. That doubtless explains why this new formula has been frankly abandoned by the state.

"Using road" is a self-denying phrase. The "reporting road" is the one making the returns of taxable gross earnings. In the case of the latter's debit balances for car rentals, it is both the using and reporting road. Defendant's mileage in Minnesota is taken as .11 of one per centum of that of its entire system. The application, for present [fol. 166] purposes of that percentage to its own net system credit balances is indefensible for the simple reason that it helps not at all in ascertaining the amount of car rentals earned by defendant's cars in use by other roads in Minnesota. Plainly, for that purpose, the factor of allocation must be the extent of the use of the cars in Minnesota. The reporting or owning road's Minnesota proportion of its whole mileage is in consequence irrelevant; and the Minnesota proportion of the using road's determinative. Because the so-called defendant's formula used the former, erroneous ratio (that of the reporting road), it was properly rejected below.

Judge Michael used a method of his own. Between the defendant and all other lines he first struck one balance for the eight years (by deducting total debits from total credits), to which, for the purpose of determining the Minnesota proportion, he applied the *average* percentage (10.39) that all of the using roads' mileage in Minnesota bears to their total mileage. The Minnesota proportion of defendant's gross credits for the eight years (\$17,427,-861.79) was \$1,811,181.03 or 10.39 per cent of the whole. That rate was taken as indicating the extent of the Minnesota use of defendant's cars by other lines for all the years.

The figures for each system and year were not made or taken separately.

That method worked out as follows:

Defendant's total credits for the 8 years	\$17,427,861
Defendant's total debits for the 8 years	14,924,508
	<hr/>
	\$ 2,503,353
	<hr/>

Taking the credit balance of \$2,503,353 as defendant's system earnings from car rentals, and 10.39 per cent thereof as allocable to Minnesota, gives the sum of \$260,088. One more subtraction was made, .11 per cent thereof, or \$2,753, making the net sum subjected to tax by the decision below \$257,350.

The last allowance was fixed by the fact that only .11 per cent of defendant's mileage is in Minnesota. It was [fol. 167] erroneous, we hold, because defendant had already been given credit for all debit balances, i.e. for the sums it had paid other lines for the use of cars in and out of Minnesota. The additional and final .11 per cent allowance of \$2,753 was, pro tanto, a duplication of one already made.

In the formula adopted below, there is another more serious and pervasive error. Its use of the average percentage for the 21 roads, other than defendant, is erroneous for formulary purposes in this. Only the user's Minnesota proportion of its own mileage is applicable to rentals it pays in order to allocate a proper portion of the latter to Minnesota. But the use of one average Minnesota proportion for all 21 lines makes the multiplier the user's Minnesota mileage in combination with that of all the other lines. Pro tanto, the small Minnesota ratios of the mileage of some lines is applied to the large credit balances due from other lines with a much larger Minnesota mileage. To illustrate. In 1922, the Chicago, Great Western Railway, with a Minnesota mileage of 13.06 per cent of its total, owed defendant a credit balance of \$88.26. For the same year, the Minneapolis, Northfield & Southern Railway, with 100 per cent of its mileage in Minnesota, owed defendant a similar balance of \$1,666.10. All of the latter was earned in Minnesota. But if the Minnesota average rate of local mileage of the two roads (13.06 plus 100), 56.53 per cent, is applied, the credit to this state is cut almost in half. There is a corresponding increase of the

portion of the small Chicago, Great Western balance allocable to Minnesota. The illustration shows the fallacy which condemns any method based upon an average rate per centum of Minnesota use by all the other roads.

Moreover, annually some roads are creditors of defendant. It owes them for car rentals to which balances is to be applied only the user's (its own) Minnesota mileage ratio. But if one average for all lines is taken, an assumed [fol. 168] Minnesota use by defendant's creditors is included although they have no such use at all for the year in question. The general average per centum, as used by the court, is a constant factor. Its use ignores the factual lack of relation between it, as the multiplier, and the total figures of all the lines used as the multiplicand. There simply is no basis for allowing the Canadian National Railway's mileage ratio of .01 per cent any potency in reducing the much larger Minnesota ratios of all the other roads. Yet that is what happens if the ratios are independently averaged and the result applied as multiplier to the total credits (of all lines) due defendant. In allocating to Minnesota its proper proportion thereof, the figures for each road must be computed separately—its own balance used as multiplicand, and its own Minnesota proportion, in rate per centum, as the multiplier.

Using on their total car rental debt to defendant an average Minnesota mileage ratio for all the roads applies a constant arithmetic mean to 21 variants, some of which are extremely so. The arithmetic mean, or average, becomes unrepresentative in proportion to the amount of aberration in its component items. In consequence, when applied as multiplier to any such item, it produces a product out of line with truth in proportion, not only to the variance from the norm of such item, but also deranged by the influence of the similar variance of the other extreme items used in striking the mean.

What we must somehow determine, as nearly as may be, is the amount of money derived from the use of cars in Minnesota. On that question, what has been paid for such use in other states has no bearing. Hence, in any such computation or formula, defendant should not have credit for the whole of its debit balances. It is entitled only to allowances for the portion of such balances properly chargeable to Minnesota. Defendant is taxable only on rentals for the use in Minnesota of its cars. Therefore, of receipts for

allocation to Minnesota, no reductions can properly be made of sums it has paid other lines for the use of their cars [fol. 169] outside Minnesota. But the decision below does just that. Having gotten the Minnesota proportion of all defendant's credit balance, the ruling was that there should then be applied in reduction thereof, in order to get at the sum taxable, the whole of defendant's debit balances, rather than only the proportion thereof chargeable for use of cars in Minnesota. The latter can be computed by using on any such balance, as a multiplier, the Minnesota percentage (.11 per cent) of defendant's mileage. As to its debit balances, defendant was the using line. Hence, the proportion of such use in, and the proportion of the resulting debt chargeable to, Minnesota is equivalent, for the purposes of a formula, to the Minnesota proportion of defendant's mileage.

In this battle of formulae, those already referred to have been eliminated for reasons stated. There is but one other which counsel style the "Burlington Formula." It was not even suggested below until the motion for amended findings or a new trial. The trial judge rightly considered it "a clear attempt on the part of the state to shift its position, from what it assumed in levying the taxes, in its complaint, and maintained throughout the trial". His view was further that the Burlington formula was no part of the record, "and even if it were, there are not sufficient facts and data in evidence to correctly apply it." This last formula, and best of the lot, was not submitted as such during the trial, but, with the exception soon to be noted, the record does disclose, as will later appear, the "facts and data" to which it may be applied, and that with justice.

We are not trying the case anew. But we are reviewing the record and decision below, and, in the latter, to the extent indicated, we find error that prevents an affirmance. Unless we direct judgment, we must order a new trial, or at least enough of one to furnish adequate basis for the application of what, so far as now appears, is the formula which most fully and with the greatest justice meets the need of the case.

[fol. 170] Briefly, the Burlington formula proceeds thus: For each of the eight years, defendant's balances, both debit and credit, with each of the other roads, were struck. The Minnesota proportion of each such credit balance was then reckoned by using thereon as a multiplier the Minne-

sota per centum of the using line's mileage. The actual figure for each road for each year was so used. The Minnesota proportion of the defendant's credit balances so ascertained for each road for each year, the next step was to allocate to Minnesota its portion of defendant's debit balances, which, on the basis of mileage, is .11 per cent of the total. The Minnesota proportions of defendant's debit and credit balances being so computed, the next and simple step was to subtract total debits from total credits and so arrive at the sum taxable in Minnesota for each year.

It is repetition, but probably justifiable in interest of clarity, to say that as to defendant's debit balances it was the using as well as the reporting line. Because Minnesota should not be charged for what defendant paid for the use of cars in other states, but rather and only with what it paid for their use in this state, the ratio of its Minnesota mileage is applied with obvious propriety to its debit balances to ascertain the portion thereof charged for their use in Minnesota and so to be deducted from the credit balances in order to get finally the sum locally taxable.

On the merits of the case arithmetically, nothing more need be said. Belated as was its presentation to the trial court, the Burlington formula comes nearer to reaching with justice and accuracy the desired result than any of the others. It should be adopted and prevail unless the ingenuity of counsel and accountants achieves something better. We would order judgment thereon but for the fact that the defendant should have the opportunity by evidence and argument in the trial court to present its own figures and contentions concerning the application to it of the [fol. 171] Burlington formula. All the data for its use are in the record now by way of evidence, except possibly those showing the Minnesota percentage of the using line's mileage. Those figures, except for defendant itself, were not presented by evidence. We apprehend that little or no additional evidence will be needed. Counsel should be able to get with certainty, and agree upon, the one set of figures needed and not appearing in the evidence as it stands. To the extent indicated, and to that extent only, there must be a new trial. The figures furnished by the state in aid of its motion for amended findings or a new trial and in argument here indicate that the total tax for the eight years, computed on the Burlington formula, will be \$26,414.59.

The only objective of the new trial, if one is necessary for that purpose, is to determine the correct amount.

2. There is argument for defendant that, because long ago it paid the taxes for the years in question as then computed by proper officers of the state (including an additional amount omitted from the first payment and later demanded), the state is now estopped to claim any additional sum. There can be no such estoppel for the simple reason that in the imposition of taxes the state acts in its sovereign rather than its proprietary capacity. *C. St. P., M. & O. Ry. Co. v. Douglas County*, 134 Wis. 197, 114 N. W. 511, 14 L. R. A. (N. S.) 1074; see *State v. Horr*, 165 Minn. 1, 205 N. W. 444. Had the transaction been in the latter category; that is, had the issues arisen from an ordinary business transaction as distinguished from the functioning of the state as a sovereign, it would be, we assume, a fair target for estoppel under the rule of *State v. Horr*, 165 Minn. 1, 205 N. W. 444, and *State v. Gardiner*, 181 Minn. 513, 233 N. W. 16.

There is also argument that because defendant paid the small additional sum omitted from the first payment as above indicated, pursuant to an audit made by representatives of the state, the latter is bound as by an account stated. See *State v. Illinois Cent. R. Co.* 246 Ill. 188. Concerning that it is enough to suggest that an account [fol. 172] stated as a defense must be specially pleaded. *Board of Co. Commrs. of Mower County v. Smith*, 22 Minn. 97. No such defense was pleaded in this case. So we are not required even to consider whether for a tax liability, fixed and imposed by statute, there can be substituted the different obligation of an account stated between officers of the state and a taxpayer.

So far as the decision and judgment below affirm the liability of defendant for the gross earnings tax because of its operation of the involved trackage in Minnesota, they are affirmed. But, for reasons already stated, the judgment in its determination of the amount of the tax is erroneous and to that extent must be reversed with directions for a new trial of that one issue.

So ordered.

Stone, J.

Mr. Justice Peterson took no part in the consideration or decision of this case.

[fol. 173]

[File endorsement omitted]

IN SUPREME COURT OF MINNESOTA

31216

No. 142. Ramsey County. Stone, J.

STATE OF MINNESOTA, Appellant,

vs.

ILLINOIS CENTRAL RAILROAD Co., Respondent.

SYLLABUS

Because the obligation to pay gross earnings taxes is imposed by statute and an account stated has the effect of creating a new cause of action independently of its original subject matter, the taxpayer cannot have the benefit of discharge as on an account stated because of the payment of a sum, erroneously computed and less than the amount actually due, even though it be accepted by the tax commission as in full discharge of the obligation.

Rehearing denied.

OPINION ON PETITION FOR REHEARING—Filed Oct. 22, 1937

STONE, Justice—

Defendant's petition for rehearing is denied. But because there must be a new trial to the extent indicated in our decision, which is adhered to, it is proper that we should express ourselves on the following points raised by defendant's petition.

Again we are urged to consider the argument that defendant discharged its full liability to the state by paying the taxes as computed by the tax commission and its examiners, long before this suit was brought. Without de-[fol. 174]bate as to its soundness, we allow for the purposes of argument defendant's contention that its answer should be construed as having pleaded the defense of account stated. With that assumption, the next thing for consider-

ation is the authority of the Minnesota tax commission in the determination and collection of gross earnings taxes. Under Section 2239, Mason Minn. St. 1927, "the public examiner with the approval of the tax commission" has the "power to prescribe . . . a system of gross earnings accounts . . . provided that such system shall conform as nearly as practicable with that prescribed by the federal government."

As matter merely of statutory construction, the proviso conforming the state to the federal system of accounting indicates no intention other than one for regulation of the accounts of those subject to gross earnings taxes. That exclusionary effect but confirms the conclusion, that necessarily would follow in any event, that no power is vested in the public examiner or tax commission in any manner to relieve the taxpayer from the fixed obligation to pay the tax imposed by statute.

Absent official power to alter the statutory obligation of the taxpayer, nothing done by the tax commission, its examiners or auditors, can create the new obligation of an account stated to qualify that of the taxpayer, or diminish the sum due from it under the law. It is elementary that an account stated creates a new cause of action, independent of the claim or claims which were its original subject matter. Hanley v. Noyes, 35 Minn. 174; Morse v. Minton, 101 Iowa 603, 70 N. W. 891, 1 R. C. L. 212.

We have given further consideration to State v. Illinois Central R. Co., 246 Ill. 188. That case went for the taxpayer upon the ground that in the exercise of the "full power" conferred upon the governor, there had been a settlement in the nature of an account stated between him and the taxpayer. The controlling thought was that the issue had already been decided by the chief executive of [fol. 175] the state, rather than any inferior officer, in the exercise of the "full power" vested in him by the controlling statute. The presumption was invoked that "where a duty is devolved upon the chief executive of the state rather than upon an inferior officer, that it is so because his superior judgment, discretion and sense of responsibility were confided in for a more accurate, faithful and discreet performance than could be relied upon if the duty were devolved upon an officer chosen for inferior duties".

The present issue is in no such matrix of law and fact. There has been no final determination by the executive department in the exercise of the "full power" vested in the governor of Illinois and controlling in the case just cited. Here no "full power" has been vested in anybody. The only authority is the one noted, to prescribe a system of accounts. Certainly, nothing more need be said to show how plainly the whole question is left for final settlement by the orderly method of adjudication where resort must be had thereto.

What we have said disposes also of the argument that "the tax commission, not this court, has power to prescribe the formula." The tax commission has no power, as matter of accounting or otherwise, to collect taxes under a formula which results in the collection of either less or more than under the law and on the facts is found due from the taxpayer. And we pretend to no ultimate formula-making power. We have only the judicial task of applying the law to the facts, and that we have already done in this case to the best of our present ability.

There is argument which need not be summarized that "the tax as sought to be imposed violates" defendant's constitutional rights. In view of the new trial that has been ordered, defendant will have full opportunity to present [fol. 176] that argument below; and make such record as may be necessary to insure its proper consideration. Nothing said in our decision will be construed as foreclosing any defense on constitutional grounds. But the main point remains that the amount due will be determined on the so-called Burlington formula unless a better one appears.

Rehearing denied.

Stone, J.

Mr. Justice Peterson, having been attorney general and counsel below, took no part in the consideration or decision of this case.

[fol. 177] IN SUPREME COURT OF MINNESOTA

31216

STATE OF MINNESOTA, Appellant,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, Respondent.

JUDGMENT—Nov. 2, 1937

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court, within and for the County of Ramsey be and the same hereby is in all things reversed with directions for a new trial.

And it is further determined and adjudged that appellant herein, do have and recover of respondent herein, the sum and amount of Two Hundred Ninety-nine and 10/100 Dollars, (\$299.10) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed Nov. 2, 1937 by the Court.

Attest: Russell O. Gunderson, Clerk.

[fol. 178] IN DISTRICT COURT OF RAMSEY COUNTY

Second Judicial District

STATE OF MINNESOTA, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, Defendant

NOTICE OF MOTION FOR LEAVE TO AMEND AMENDED ANSWER

To the above named Plaintiff, State of Minnesota, and William S. Ervin, Esquire, Attorney General, and Harry W. Oehler, Esquire, Deputy Attorney General, its Attorneys herein:

Please take notice that when the above entitled action is called for trial the defendant will move the Court for

leave to amend and for an order amending its amended and substituted answer herein by inserting therein, after paragraph XI thereof and prior to the prayer, paragraphs as hereinafter proposed and set out, said motion to be made severally and disjunctively as to each of said paragraphs and subdivisions thereof, viz:

[fol. 179]

“XII

That any construction of the Minnesota gross earnings tax statute which permits the application of the so-called ‘Burlington Formula’ now relied upon by the State in this action is violative of defendant’s constitutional rights in the following respects:

1. Such a construction of the statute and the application of such a formula would impair the obligation of the contract between defendant and the State of Minnesota:

(a) Arising from the payment by defendant of its taxes for the years in question in accordance with the formula then prescribed by the State and in accordance with the full demands of the State then made.

(b) It would impair the contract arising from the payment by defendant of the balance found due by the State’s public accountants acting under statutory authority.

Such a construction would violate defendant’s rights under Section 10 of Article I of the Constitution of the United States providing that no state shall pass any law impairing the obligation of contracts.

2. The construction of the statute so as to permit the application of the so-called ‘Burlington Formula’ results in such an unreasonable and arbitrary classification of property for taxation as to violate defendant’s rights under the Fourteenth Amendment to the Constitution of the United States in that it would be a taking of its property without due process of law and defendant would be deprived of the equal protection of the law, in that such a construction would impose a tax on but five of the twenty-two roads having freight car per diem earnings in the State of Minnesota; the classification being such that only five of the smaller roads would be required to pay any tax and seventeen of the larger roads would be entirely exempted. The amount of this gross earnings tax would thus be in inverse proportion to the amount of business done.

3. A construction of the Minnesota statute permitting the application of the 'Burlington Formula' would be violative of defendant's rights under the provisions of Section 1 of Article IX of the Minnesota Constitution requiring that taxes shall be uniform upon the same class of subjects.

4. Such a construction of the statute and the application of the so-called 'Burlington Formula' would in effect be the enactment of a statute retrospective in effect and thus violative of defendant's rights under the provisions of Section 10 of Article I of the Constitution of the United States providing that no ex post facto law, nor any law impairing the obligation of a contract shall be passed; and violative of Section 11 of Article I of the Constitution of the State of Minnesota providing that no ex post facto law, nor any law impairing the obligation of contracts shall ever be passed.

5. Such a construction of the Minnesota statute and the imposition of such a tax would place an unreasonable burden on interstate commerce in violation of Section 8 of Article I of the Constitution of the United States providing that Congress shall have power to regulate commerce between the states.

XIII

That a better formula than the so-called 'Burlington Formula', and the only one permitted under a proper construction of the statutes, is that which the State adopted and promulgated for the years in question, i.e., that which requires the striking of a system balance and the allocation to Minnesota for taxation of a percentage thereof equal to the percentage of the reporting company's line in Minnesota.

XIV

That in the year 1931 plaintiff and defendant stated an account of the amount due from defendant to plaintiff for additional gross earnings tax on income from freight car per diem rental for the years 1921 to 1929, both years inclusive, and thereafter defendant paid to plaintiff the full amount ascertained, determined, and stipulated to be due by and pursuant to said account stated in full accord and satisfaction of any and all obligation of defendant to plaintiff in respect of such tax for said years."

Said motion will be made upon the following grounds:

1. That the answer heretofore filed in said cause was made without knowledge of the fact that the plaintiff State would rely upon the so-called "Burlington Formula". That the Burlington Formula was injected in this case for the first time by plaintiff in its motion in the District Court for amended findings of fact. That it was not pleaded nor in any way referred to in the complaint filed herein. That defendant has had no opportunity to attack said formula or answer the claims of the State in that respect.

2. The Supreme Court of the State of Minnesota in passing on this case on appeal concluded its decision in the following paragraph:

[fol. 182] "There is but one other (formula) which counsel style the 'Burlington Formula'. It was not even suggested below until the motion for amended findings or a new trial. The trial judge rightly considered it 'a clear attempt on the part of the State to shift its position, from what it assumed in levying the taxes, in its complaint, and maintained throughout the trial'."

And also:

"On the merits of the case arithmetically, nothing more need be said. Belated as was its presentation to the trial court, the Burlington formula comes nearer to reaching with justice and accuracy the desired result than any of the others. It should be adopted and prevail unless the ingenuity of counsel and accountants achieves something better. We would order judgment thereon but for the fact that the defendant should have the opportunity by evidence and argument in the trial court to present its own figures and contentions concerning the application to it of the Burlington formula."

3. That the opinion of the Supreme Court on defendant's motion for rehearing concluded with the following paragraph:

"There is argument which need not be summarized that the tax as sought to be imposed violates defendant's constitutional rights. In view of the new trial that has been ordered, defendant will have full opportunity to present that argument below and make such record as may be

necessary to insure its proper consideration. Nothing said in our decision will be construed as foreclosing any defense on constitutional grounds. But the main point remains that the amount due will be determined on the so-called Burlington formula unless a better one appears."

[fol. 183] 4. That proposed paragraph XIII hereinabove set forth is responsive to what was said in the opinion of the Supreme Court, to the effect that "the 'Burlington Formula' shall be adopted and prevail unless the ingenuity of counsel and accountants achieve something better" and "but the main point remains that the amount due will be determined on the so-called Burlington formula unless a better one appears."

5. That in its original opinion the Supreme Court said that the defense of account stated was not pleaded in defendant's answer, and in its opinion upon the plaintiff's Motion for reargument the Supreme Court said that for the purpose of argument it allowed defendant's contention that its answer should be construed as having pleaded the defense of account stated.

6. That the proposed amendments are in the main responsive to the suggestions contained in the opinion of the Supreme Court and will clarify defendant's position and more fully present its contentions with respect to the so-called "Burlington Formula" and its defenses thereto.

Doherty, Rumble, Butler, Sullivan & Mitchell, E-1006
1st Natl. Bk. Bldg., St. Paul, Minnesota. R. C.
Beckett, Chas. A. Helsell, 135 E. 11th Place,
Chicago, Illinois, Attorneys for Defendant. V. W.
[fol. 184] Foster, E. C. Craig, 135 E. 11th Place,
Chicago, Illinois, of Counsel.

IN DISTRICT COURT OF RAMSEY COUNTY

Statement of Evidence

The above entitled matter duly came on for hearing before the Honorable Gustavus Loevinger, without a jury, on January 13th, 1938, and continued through January 17th, 1938.

APPEARANCES:

William S. Ervin, Attorney General, and Harry W. Oehler, Deputy Attorney General, of the State of Minnesota, for Plaintiff;

Doherty, Rumble, Butler, Sullivan & Mitchell and C. A. Helsell and R. C. Beckett, Attorneys, for the Defendant.

Thursday, January 13, 1938, ten o'clock A. M., Court convened and the following proceedings were had:

COLLOQUY

The Court: How does this matter come up now?

(Whereupon opening statements were made by Mr. Oehler on behalf of the Plaintiff and by Mr. Helsell on behalf of the Defendant. In the course of the remarks by Mr. Helsell the following occurred:)

[fol. 185] Mr. Helsell: We are here today, if the Court please, for the purpose of permitting the defendant to supplement the record in this case and urging any defense it may have, constitutional or otherwise, to this Burlington formula which the Court said, "crept under the tent after the case was tried." Now, ~~I have~~ I have a motion for leave to amend our answer. In fairness to this Court it should be said that last week there was presented to Judge Michael, before whom the case was originally tried, a motion for leave to file an amended and substituted answer, a completely new answer, which set up all of the old defenses, some new ones and also set up some claims with respect to the Burlington formula. We were asking that, as we thought, for the purpose of clarity and in order to eliminate the other pleadings which had been filed before. We thought it best to incorporate our defenses into a single paper and asked leave to file an amended and substituted answer, but Judge Michael said those issues had been decided by the Supreme Court and we could not file a new answer and set up defenses to issues which are foreclosed. We are now asking to file an amendment to the answer which does not include the old defenses or any of them. Our motion is in the disjunctive to be permitted to amend our answer in these several respects and the Court please, I think it is proper for us at this time to present to you our request to file an amended answer. The purpose of this amendment

is to set up our defense to the Burlington formula and I think the Supreme Court has said we were entitled to do that. This motion is not the same as presented to Judge Michael last week.

[fol. 186] The Court: If I understand it, the answer which you are asking now for leave to amend is the answer which is a part of the judgment roll which was called the amended and substituted answer of the Illinois Central Railroad Company which was filed October 24, 1935?

Mr. Helsell: Yes, sir, it is an amendment to the answer of 1935.

The Court: All right.

Mr. Helsell: And it is adding to that answer only allegations with respect to this new Burlington formula which was never in the case before. "XII. That any construction of the Minnesota gross earnings tax statute which permits the application of the so-called 'Burlington Formula' now relied upon by the State in this action is violative of defendant's constitutional rights in the following respects:" Then we allege five constitutional grounds in which we claim the Burlington Formula violates our rights. It is unnecessary, perhaps, to read them.

The Court:

Based upon this view the Court is constrained to deny the request to amend the answer by the addition of paragraph 14.

With reference to paragraph 12. This is a tax case. Tax cases are generally largely matters of law or expert opinion rather than a matter of differences of opinion as to the basic facts. I apprehend that is the situation here. To what [fol. 187] extent, in a tax case, legal or constitutional objections should be incorporated in an answer is a matter of professional opinion, probably. And the Court is not inclined to set up its opinion as against that of counsel who are charged with the responsibility of representing their respective clients and presenting for litigation every claim either for or against the tax. As I understand it, the trial court should be liberal in allowing amendments to an answer in order that every permissible defense may be liti-

gated on its merits so that when the litigation is over everything that might or could or should have been litigated will be disposed of. The Supreme Court has not eliminated consideration of constitutional objections to the Burlington formula. Without determining the validity of any of the objections, but treating them merely as pleadings and not passing on the merits, the Court is of the opinion that it should allow the amendment embodied in paragraph 12, and it is so ordered.

The Court:

It is ordered that the now proposed paragraph 13 be allowed. You had better read it into the record.

Mr. Oehler: For the reasons heretofore indicated, note an exception to the Court's ruling.

The Court: Exception granted.

Mr. Helsell: The defendant, as a substitute for paragraph 13 of the amendment to its answer, submits the following:

That a better formula than the so-called Burlington formula is the following: Compute the credit or debit balance on freight equipment interchanged with all other railroads operating in Minnesota; said balance being obtained by striking a system balance with each road, offsetting the sum of debits against the sum of the credits. The resulting credit balance, if any, should be apportioned to Minnesota for taxation on the basis of the reporting company's percentage of track mileage in the State as compared with its total system track mileage.

Mr. Helsell: Will you note an exception to the ruling of the Court disallowing defendant's motion for leave to amend insofar as that ruling did not permit the inclusion in the amendment of paragraph 14?

The Court: Exception granted.

STIPULATION

Mr. Helsell: May the record show that the parties hereto stipulate that the record in the former trial, together with

all exhibits then offered or received, may be considered a part of this hearing, with the same force and effect with which they were either received or offered, together with the exceptions there noted?

Mr. Helsell: Subject to the same objections, the same rulings and the same exceptions as there noted.

The Court: Very well. Of course, if any evidence was offered subject to an objection and a ruling thereon, as I understand it, the Court at this time—the evidence would be received subject to the same objection and presumably the same ruling and subject to the same right of appeal from the ruling if it is erroneous.

[fol. 189] Mr. Oehler: If the Court please, now, upon the record as made, the opinion of the Supreme Court, the proceedings that have been had before Your Honor, and Judge Michael, relative to amendments, including this last amendment designated as amendment number 13, the state asks permission of the Court to rest at this time, provisionally at least, for the purpose of obtaining a ruling upon the opinion and the necessity of the State going further with this case. I call the Court's attention to folios 122 to 126—167 to—folios 167 to 172 and folio number 280, to the effect that the figures and percentages are all in the record from which the "Burlington" formula, so-called, and as it may apply to the defendant here may be computed and ascertained.

The Court: Let me ask you. If I understand it correctly, the tax which the State Tax Commission originally levied and on which this action is brought contained all the figures which are essential to the percentage or to the application rather of the "Burlington" formula, but the error, if I understand it, was that the percentages were applied to the receipts from each of the railroads and to the disbursements to each of the railroads instead of the percentages given in the evidence being applied only to the credit or debit balances. If I understand it then there would be no other different or additional figures necessary for the application of the "Burlington" formula to the debit and credit balances, as shown arithmetically as a part of the motion for new trial as made by the state. Is that right?

Mr. Oehler: That is right, Your Honor.

The Court: Is that admitted by the taxpayer?

[fol. 190] Mr. Helsell: Yes.

The Court: All right.

Mr. Oehler: Then the state rests provisionally with that understanding.

The Court: I don't know what a provisional resting is.

Mr. Oehler: I will rest. That is, the resting is upon the ground stated, everything considered.

(Whereupon, to maintain the issues on the defendant's behalf to be maintained, Mr. Helsell and Mr. Beckett made further opening statements and the following evidence was introduced:

HARRY E. BOYLE, called as a witness on behalf of the defendant and after being duly sworn, testified as follows:

Direct examination.

By Mr. Helsell:

Q. Where do you live, Mr. Boyle?

A. St. Paul.

Q. And what is your occupation?

A. I am Chairman of the Minnesota Tax Commission.

Q. How long have you occupied that position?

A. One year as Chairman, four years as a member before that.

Q. You have, then, been a member of the Minnesota State Tax Commission since the commencement of the suits by [fol. 191] the State for the collection of certain alleged omitted gross earnings taxes from a number of railroads?

A. I have been on the Commission since February, 1933.

Q. Have you made any examination of the records of the Commission, or can you tell us from your own personal knowledge, what action the Commission has taken with respect to the adoption of any formula by which a part of the alleged gross earnings from freight car per diem may be allocated to Minnesota for taxation?

Mr. Oehler: I object to that as incompetent, irrelevant and immaterial and having no bearing upon the issues here presented—whether they have taken any steps with reference to a formula or not. Section 2237 provides, in substance, that when and if the Tax Commission makes a certification that certification is competent and prima facie evidence in any Court, and I submit that, under the present state of the record, whether the Tax Commission did or

did not make any rule is not germane to the issues here presented.

The Court: Well, he may answer that question yes or no. Exception.

A. No.

Mr. Helsell: It has been suggested that this examination is examination of an adverse witness and under the statute is cross examination. We are offering the testimony under that statute.

Mr. Oehler: If the Court please, the State opposes the suggestion of counsel that this witness may be called as an [fol. 192] adverse witness to this action and cross examination as an adverse party. Mr. Boyle is not a party to this action and I submit he may not be, properly, called for cross examination under the statute.

The Court: The question raised by the objection is a novel one as far as I am concerned. It does appear that this is an action brought by the State. Of course, not every state department is interested in the prosecution of this action. I presume that the record shows, and I presume it is a fact, that the State Tax Commission is the particular agency of the State that is prosecuting this action, although in this agency and most other agencies in prosecuting the action must prosecute it in the name of the State. The Attorney General and his assistant appears here nominally as the attorney for the State, but actually he probably is the attorney for the state agency known as the Minnesota Tax Commission. If the action were brought in the name of the Minnesota Tax Commission instead of in the name of the State it would seem as though the chairman of the Commission might well be considered such an agent as might be cross examined under the statute. It might well seem that in view of the peculiar nature of the functions of the Minnesota Tax Commission, the Chairman of that Commission might be considered the managing agent of that particular department of the state's activities. Consequently, I am inclined to think that he may be called as for the purposes of cross examination. But, aside from that, I apprehend that it really wouldn't make much difference. It must be apparent that in fact, regardless of whether he [fol. 193] may or may not be called for cross examination, he would normally be an adverse witness and I doubt whether the Court would be warranted in assuming that the tax-

payer, in calling him, is bound by his evidence the same as it might be by its own accountants. So I don't think it makes much difference, but in order to bring the question before the Supreme Court for a ruling I shall rule that he may be called as an adverse witness upon the theory that he is the managing agent of the taxing activities of the State, primarily interested in this litigation. Proceed. (Plaintiff excepts.)

Q. As Chairman of the Tax Commission you of course know that the railroads in the State are taxed on their gross earnings?

A. I do.

Q. By the imposition of a five percent tax on their gross earnings, that is true, is it not?

A. Yes.

Q. You are also aware of the fact, as a member of the Commission, that the Commission and the State have been endeavoring to collect a gross earnings tax on the freight car per diem of the road?

Mr. Oehler: Just a minute. I object to the form of the question in that "the State Commission has been attempting" to do it. The State is a party to this action and the State is attempting to do it.

The Court: I don't think anyone is misled by the form. I think I will overrule the objection. (Plaintiff excepts.)

A. I am.

[fol. 194] Q. During your membership on the Commission have you had occasion to learn whether or not the railroads have kept such records as will enable them to tell exactly when freight cars pass from one state to another?

A. I do not know whether they keep such records.

Q. So far as you know, however, the Commission has never prescribed a system of accounting or any rule which required the railroad companies to keep an actual record of the exact time the freight cars pass from one state into the State of Minnesota.

Mr. Oehler: I object to that as incompetent, irrelevant and immaterial.

The Court: Overruled. (Plaintiff excepts.)

A. No, I know of no such rule.

Q. In the absence of accurate records how has the Commission determined what amount of the alleged freight car

per diem earnings of the system—the entire system—of any railroad is allocable to the State of Minnesota?

Mr. Oehler: I object to that as incompetent irrelevant and immaterial, how they determined the tax.

The Court: Your objection is, how they determine the tax. This is how they determine the state's proportion of the earnings.

Mr. Oehler: That is correct.

The Court: I don't see what bearing your objection has to the question. Objection overruled. (Plaintiff excepts.)

[fol. 195] A. The railroad companies file their gross earnings report in the Tax Commission. There is a number of items on the report, including, "Hire of Equipment". The Tax Commission checks the report—or employees of the Tax Commission check the report as to the accuracy of the figures and the total is figured at five per cent. Later on the audit is made by the Comptroller's office and if there has been omitted gross earnings it is reported to the State Tax Commission.

Q. In order to audit the railroad company's report, there being no actual record of freight car per diem earnings—that is, there is no record of the time—of the amount which has accrued in the State of Minnesota, some system of accounting must be adopted by the Commission or the corporate examiners, is that correct?

The Court: May I suggest to counsel that I believe it already appears in evidence what system the Tax Commission has used, at least prior to 1933, and it already appears in evidence that after the trial before Judge Michael, at least so far as this taxpayer is concerned, it proposed to use the so-called "Burlington formula", and I do not know what advantage it would be here to go into the question of whether or not it erroneously used some other formula heretofore.

Mr. Helsell: That was not, if the Court please, the purpose of my question. The question was intended to ascertain whether or not the Minnesota Tax Commission had prescribed any formula.

The Court: He has already answered that "no".

[fol. 196] Q. Then am I correct in stating, and is the Court correct in understanding, Mr. Boyle, that the Commission

never has adopted or promulgated the "Burlington formula"?

A. Oh, no. We have followed the "Burlington formula".

Q. For how long?

A. Well, I think, since the institution or settlement of those cases.

The Court: That doesn't fix any point of time for me.

A. Your Honor, I don't know the date of the stipulation of settlement of those cases.

The Court: Approximately when was it?

A. I think about a year ago, or so.

Q. In order, Mr. Boyle, that the date may be before us I call your attention to this paper which has been identified by the reporter as defendant's exhibit number 1—

The Court: Wouldn't it be better to give it a number following that last number in the preceding trial so that there won't be any confusion in the record before the Supreme Court? My recollection is the last number was 18. Start arbitrarily with 20. (Whereupon the number on the above exhibit was changed to 20.)

Q. This paper which I have shown you, defendant's exhibit 20, is a stipulation in settlement of one of those suits—

[fol. 197] Mr. Oehler: Just a minute. I object to counsel telling the Court what that document is. He is only to use it for the purpose of fixing a certain date.

The Court: Let counsel finish the question, then make your objection after he is through. Then the Court will know what it is ruling on.

Mr. Oehler: He was reading into the record what the document is.

The Court: The Court will preserve the integrity of the record.

Q. Mr. Boyle, this paper to which I have called your attention is a stipulation in settlement of one of those suits, is it not?

A. It appears so.

Mr. Helsell: Will the Attorney General admit he furnished this copy and it is a correct copy of the stipulation of settlement in the Burlington suit?

Mr. Oehler: I submit that is immaterial at this time. The exhibit was shown to the witness in the first instance solely for the purpose of fixing a time when the Burlington formula was first applied and adopted by the State. Otherwise it is immaterial and irrelevant at this time upon the present state of the record.

The Court: I assume that the purpose of fixing the nature of the document is to give authenticity to its date.

Mr. Oehler: That is all I understood, the date.

[fol. 198] The Court: You are not permitting the witness to give that information. Is it or is it not an authentic settlement of the Burlington suit?

Mr. Oehler: It represents the date, yes.

The Court: Of a settlement made?

Mr. Oehler: Made under the "Burlington" formula, Your Honor.

Q. Can you now state what date that was?

A. I did not execute that stipulation so I do not know whether the date upon it is the correct date or not.

Q. Do you know whether or not Mr. Nelson, the Secretary of the Commission, filed these stipulations of settlement?

A. His name appears thereon.

Q. Is that his signature?

A. Yes, I think it is.

Q. And, so far as you know, Mr. Boyle, that case was settled on or about that date, May 1, 1935?

A. As far as I know, yes.

Q. Did you, as a member of the Commission, authorize the Attorney General to make that settlement?

Mr. Oehler: Objected to as immaterial.

The Court: Objection overruled. (Plaintiff excepts.)

A. We concurred in the settlement.

Q. Prior to the settlement of these cases had the "Burlington" formula ever been adopted by the Commission?

Mr. Oehler: Just a minute. Objected to as immaterial.

The Court: I don't know whether it is material or not. Objection overruled. I suppose that means had it ever been actually applied? (Plaintiff excepts.)

A. No.

Q. More than that, I want to know whether the Commission, acting as a Commission, had formally adopted such a formula?

A. I think the concurrence in the stipulation in the settlement of these cases, based on the "Burlington formula", was the first time it had been applied.

Q. Was that the only adoption ever made of the "Burlington formula", that is; the application of it to these settlements?

Mr. Oehler: I object to that as immaterial.

The Court: He may answer as best he can. (Plaintiff excepts.)

Q. What I mean, Mr. Boyle, what I am trying to get at, is this: Did the Commission, acting as a Commission, ever, by formal action such as a motion or resolution, adopt the "Burlington formula"?

Mr. Oehler: I object to that as immaterial and irrelevant.

The Court: I don't know whether it is material or not. [fol. 200] Objection overruled. (Plaintiff excepts.)

Mr. Oehler: May it be understood I may have exceptions to the various adverse rulings to preclude the necessity of noting exceptions?

The Court: You may.

Mr. Oehler: That may be so understood?

The Court: Yes.

Mr. Helsell: May that be understood for both sides, if the Court please?

The Court: I think it should be. Probably the same privilege should be extended to both sides and it may be so understood.

A. I don't recall of any formal resolution ever being adopted by the Commission. I know that the Commission authorized Mr. Nelson to sign, on behalf of the Commission, these stipulations of settlement on the "Burlington formula".

Q. You are here, Mr. Boyle, under a subpoena which asked you to bring with you any books, papers, records, memoranda of the Commission, which showed the adoption by the Commission of any formula of this character, is that not true?

A. Yes, it was a broad subpoena.

Q. Have you made a search of the Commission's records?

A. I have not.

Q. (Continued) To learn whether any formulas have [fol. 201] been actually adopted and made of record by the Commission?

A. The Secretary is the custodian of all records of the Commission and he was also subpoenaed and I had him bring here to Court all the records we have that you asked for in the subpoena. I personally didn't make a search nor have control of the records.

Q. But it is true, is it not, that so far as you know there is no record of the Commission ever having formally adopted, by motion or resolution, the "Burlington formula?"

Mr. Oehler: I object to that as incompetent and irrelevant.
The Court: Objection overruled. (Plaintiff excepts.)

A. I don't recall that there was ever a resolution or motion adopted. I didn't think it was necessary, if the Commission made a rule in any case at law that we had to make a motion and resolution besides.

Q. Is it your understanding, Mr. Boyle, that the Commission, since the settlement of this Burlington suit, has been applying uniformly the "Burlington formula" to all roads in the State of Minnesota?

Mr. Oehler: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled. (Plaintiff excepts.)

A. I couldn't tell you offhand whether or not Mr. Bergstrom, the representative of the Comptroller's office, has made an audit of any of the railroads since the signing of [fol. 202] the stipulations and the acquiescence of the Tax Commission in the "Burlington formula" to know whether or not we have applied that to omitted gross earnings since that time.

Q. The man who would make an audit of that character is Mr. Bergstrom?

A. Yes.

Q. Can you tell the Court how many railroads there are in the State of Minnesota which interchange freight cars?

A. No.

The Court: I suppose by "railroads in the State of Minnesota", you mean roads that have trackage in the State?

Mr. Helsell: Yes, sir.

Q. Can you, by referring to this exhibit in the record—the printed records in this case, on the former appeal and examining the exhibit found at page—opposite page 126—tell the Court how many roads there are in the State which interchange freight cars?

A. No, I can't tell from that.

Q. There are at least these roads that are there shown?

A. Then it speaks for itself. But I don't know that.

Q. You mean, as a member of the Tax Commission charged with the duty of looking after the collection of railroad taxes or receiving of reports from railroads of their gross [fol. 203] earnings, that you cannot tell the Court with some degree of accuracy, how many railroads there are in the State?

Mr. Oehler: Just a minute. Object to that as argumentative.

The Court: I don't know just what the purpose of the question is.

Mr. Helsell: We want to show, if the Court please, what roads there are in the State and how this "Burlington formula" works as to each.

The Court: I don't know whether it is important for this witness, as Chairman of the Commission, to have in mind the precise number of roads. I don't suppose there will be any dispute about it in fact. Still, he may not have in mind the precise number. (Defendant excepts.)

Q. Will you say there are about twenty-seven roads in the State, twenty-seven roads that operate in the State?

A. That excludes for hiring equipment?

Q. Yes.

A. I don't know.

Q. Do you know how many roads are reporting and paying to the State of Minnesota taxes on their alleged gross earnings from hire of equipment?

A. I didn't bring—

Mr. Oehler: Just a minute. I object to that as immaterial.

The Court: I can't now see the materiality of whether this witness knows those details or not. The question itself may [fol. 204] be material, but the knowledge of this witness, I don't think, is particularly important. (Defendant excepts.)

Q. The Commission does have a record, does it not, Mr. Boyle, showing roads which report gross earnings from the hire of equipment?

A. Yes, and we have been subpoenaed and brought all our records here, but I can't remember them off-hand.

Q. Can you produce records which show the reports of these roads since 1935?

A. I think the Secretary has them there.

Q. Would you prefer to have the Secretary identify those records?

A. Yes, because I haven't paid any attention to the assembling of them.

Q. Have you any record showing whether or not the Commission for the years 1922 to 1929 promulgated, adopted, or established any system of gross earnings accounting whereby, by following such a system, the amount of per diem earnings could be divided between the State of Minnesota and the system as a whole?

Mr. Oehler: Objected to as immaterial. This suit relates to years prior to 1935.

The Court: It is my understanding that the record now already shows, as a fact not questioned by either side or by anyone, that the Commission did have a formula, or devise some system for prorating the balances of any railroad operating in Minnesota of its freight car per diem or [fol. 205] revenue, between the State of Minnesota and the balance of the system. I don't see the object of asking this witness what already is uncontrovertibly in the record. (Defendant excepts.)

Mr. Helsell: I think that is all.

Mr. Oehler. The witness is excused with the understanding I may cross examine him later if I need him.

The Court: Cross examine him?

Mr. Oehler: Examine him later.

(Witness excused.)

NICHOLAS A. NELSON, called as a witness on behalf of the defendant and after being duly sworn testified as follows:

Direct examination.

By Mr. Helsell:

Q. What is your occupation?

A. Secretary of the Minnesota Tax Commission.

Q. Where do you live?

A. I live in Stillwater.

Q. How long have you been Secretary of the Commission?

A. Practically eighteen years.

Q. As Secretary are you in charge of and do you have official custody of the records of the Commission?

A. I have, yes, sir.

Q. Your office is in the State House?

[fol. 206] A. State Capitol.

Q. And your records are there kept?

A. Yes, sir.

Q. Among your records do you have those showing the returns of railroads operating in the State of their gross earnings?

A. We do.

Q. Do you have any record showing what railroads are operating in the State?

A. We have the records of the gross earnings of the railroads, which would show the railroads operating in the State.

Q. Will you produce that record, please?

Mr. Helsell: The defendant asks it be permitted to examine this witness under the statute on cross-examination.

Mr. Oehler: Object to that, if the Court please, for the grounds heretofore indicated. This man is not head of the Tax Commission—simply an employee of the Tax Commission—and he certainly is in no capacity to bind the Tax Commission.

The Court: I believe the statute says, "an adverse party or a managing agent". I have some doubt whether the Court could go beyond that and construe that someone who bears such a title, for instance as "Secretary", although he is an officer of the Commission, is, therefore, either an adverse party or a managing agent. I have extreme doubts about it. I think I will have to rule on this occasion that you will have to call him as your own witness. [fol. 207] However, as I said before, I doubt whether it makes any substantial difference on the merits. I don't believe any Court would undertake to construe his evidence as an admission against interest by yourself, by the taxpayer. Proceed. (Defendant excepts.)

Q. From an examination of your records can you now tell the Court what railroads are reporting gross per diem earnings?

A. I have the records here by years. I don't recall whether the—it may be possible—

Mr. Oehler: I object to the question as immaterial.

The Court: As I understand it, the taxpayer proposes to show that the "Burlington formula" works inequitably and in a discriminatory manner and in order to lay the foundation for that I suppose they propose to show to what railroads it would apply. I suppose that is the purpose of this question. Objection overruled. Will you answer the question, please? (Plaintiff excepts.)

A. Well—

The Court: Just answer yes or no if you can, otherwise qualify it.

A. I would like to qualify the answer if I may.

The Court: Go ahead.

A. The fact of the matter is, I was called upon to produce the records for the years 1922 to 1929 and for the current year. We have no record for the current year of any railroads because they haven't as yet made any report of the current year. I have the gross earnings reports of the rail-[fol. 208] roads filing reports from 1922 to 1929 as requested in the subpoena.

Q. Well, Mr. Nelson, when I asked for the records of the current year I meant the last year the roads made a report. Do you have those records?

A. I don't know whether they were brought in or not, I couldn't say whether they are here or not without going through the entire list. I am afraid I haven't got the record for the current year.

Q. Perhaps I can save you a little trouble, Mr. Nelson. I call your attention to this paper identified by the reporter as defendant's exhibit 21 and ask you to state whether or not in the first column is shown a list of the railroads operating in the State of Minnesota?

A. You want me to examine the names of these roads?

Q. Yes, sir.

A. These operated last year and reported last year.

Q. Do those roads operate in the State of Minnesota?

A. I believe this is a complete list, although there is one road there I am not familiar with, Minneapolis, Red Lake & Manitoba; I don't know what road that is.

Q. Will you examine this report and particularly the third column thereof and tell the Court, if you can, whether or not the figures shown in the third column under the date 1936

[fol. 209] are the figures contained in the reports of the only railroads in Minnesota which reported freight car per diem earnings for that year?

Mr. Oehler: Objected to as not the best evidence.

The Court: He may answer. (Plaintiff excepts.)

A. In the absence of the 1936 reports which I do not seem to have, I would say I couldn't do it.

Q. Well, that would be the—

The Court: Let me ask counsel. Apparently it was the intention of the Justice who wrote the opinion of the Supreme Court that there wouldn't need to be very much dispute as to facts which are matters of record and about which there could be no substantial dispute, most of the questions of counsel so far have related to State records, about which there ought not to be any dispute. What inferences are to be drawn from them or whether or not they will eventually prove material is a question for argument and for the Court, but we shouldn't have any difficulty in getting into the record the information contained in State records which a litigant desires to get into the record for whatever benefits it may give him. It seems to me that the representatives of the State are not serving the public interests particularly by being technical about the contents of these State records. We will take a recess of ten minutes. (Short recess taken.)

Q. Mr. Nelson, have you any records here which will enable you to determine whether the list of roads and the [fol. 210] amount of their returns for 1935 and 1936 is as shown by Exhibit 21?

A. I have not as yet. I have sent for them and he ought to be here any moment.

Q. Did you bring with you any record of the Commission showing the adoption of any system of gross earnings accounts which prescribed a formula such as is involved in this suit?

Mr. Oehler: Just a minute. Objected to as immaterial.

The Court: Overruled. (Plaintiff excepts.)

A. I have no record of any such formula. May I qualify the statement?

Q. If you care to.

A. I have a minute book here showing the minutes of the Commission directing me to perform certain things, if that is what you refer to. I will be perfectly fair.

Q. By that you mean you have a minute book containing a record authorizing you to sign the settlement agreement of these tax suits?

A. Yes, sir.

Q. That was in the spring of 1935?

A. The record would probably answer the purpose best. I couldn't tell you just what date.

Mr. Oehler: I will admit it was on or about May 1st, 1935.

A. I think it was along about that time.

[fol. 211] Q. That is the first and only record with respect to the Burlington formula?

A. It is the only thing I know of with reference to the Burlington formula if that was the reference that you refer to.

Q. Does the Commission still furnish forms for the returns which are made by the railroads?

A. Yes, sir.

Q. It has been the practice of the Commission, has it not, to furnish such forms from the beginning of the imposition of this gross earnings tax?

A. I can only go back as far as my service with the Commission is concerned and only tell you from that time on. I can say that since 1920 the Tax Commission has furnished those reports.

Q. The form furnished in the past, is that shown by this paper marked defendant's exhibit 2?

A. That is the form that was used in 1922. It may have been changed some as to items since that time. I couldn't say without refreshing my memory by seeing one of the present forms.

Q. The printed instructions found on the back, those are the instructions of the Tax Commission?

A. They were that year, yes, sir.

Q. During the years 1922 to 1929, inclusive, was that the form used?

The Court: Isn't all that a matter of record?

Mr. Oehler: That is the objection I was going to make.

[fol. 212] The Court: All those exhibits are now in the record. No one has contested but what those were instructions to the taxpayer.

Mr. Helsell: I am not sure whether they are going to question that. I assume it should be readily admitted by the State those are forms furnished by the Tax Commission

and those instructions were instructions promulgated by the Tax Commission. We can save time if the State is willing to make that admission.

The Court: I presume it is there already appearing in the record, whether the State is willing verbally to acknowledge it or not. I can't see where anyone could possibly doubt it or dispute it.

Mr. Helsell: I am afraid the record doesn't show it.

The Court: Very well, proceed in your own way then.

Q. Will you examine those sixteen returns made by the Illinois Central Railroad Company during the years 1922 to 1929 inclusive and state whether or not those forms were furnished by the Minnesota Tax Commission?

A. These are the forms that were furnished to the railroad company by the Minnesota Tax Commission.

Q. And the instructions found thereon are instructions promulgated by the Commission, is that true?

Mr. Oehler: Object to that as immaterial and as attempting to inject into this trial the phase of account stated [fol. 213] which has been eliminated by the order of the Court.

The Court: Overruled. (Plaintiff excepts.)

The Court: The question is, are those instructions on the back of the exhibit you have examined the instructions promulgated by the Minnesota Tax Commission to the taxpayers?

A. May it please the Court, the question is rather a hard one for me to answer for the reason I am not the one who gets out the forms and I am not competent to answer that question, but I assume they wouldn't be gotten out any other way.

By Mr. Oehler:

Q. Do you know if they ever passed a formal resolution adopting those forms?

A. Not since I went there.

Mr. Helsell continuing:

Q. The instructions, however, were on all the exhibits when they were sent out by the Commission?

A. I believe that the instructions have been on the forms ever since I became an employee of the Commission. I don't believe we have ever sent out any forms without instructions.

Q. Do you know when, if ever, any change was made in those instructions?

A. I couldn't answer the question, sir, either yes or no. I don't know. I can't tell you.

Q. You have in your records copies of all of the forms that were prepared and issued to the railroads by the Commission during the last eighteen years?

[fol. 214] A. I have here copies of the returns that were made by the railroads from the year 1922 to 1929.

Q. And during all of those years these same forms were used?

A. Apparently, yes, sir.

Q. There is, you will observe, on the back of the form instructions with reference to making returns of gross earnings from freight car per diem receipts. Do you know when, if ever, any change was made in that?

Mr. Oehler: Objected to as immaterial, if the Court please.

A. I do not—pardon me, I thought there was a ruling.

Mr. Oehler: Let the answer stand.

Q. Mr. Nelson, will you learn whether the returns for the years 1935 and 1936 are now here?

A. Yes, sir. Yes, they are.

Q. Can you check the figures on defendant's exhibit number 21 to learn whether they are correct, from those records which you now have?

The Court: Will that involve the checking of a great number of figures? I don't think we ought to take time while the Court is in session to do checking of that kind if it can be avoided. I think that can be done after Court adjourns this afternoon or tomorrow morning.

Mr. Helsell: Adopting that suggestion I will ask the witness if he will kindly check his records against that exhibit [fol. 215] and be excused and report to us when you have completed your check.

The Witness: I would like to ask a question.

The Court: Go ahead.

The Witness: Is the Court in session tomorrow?

The Court: Well, no, it won't be in session in this case again until ten o'clock Monday morning.

The Witness: We don't go to the office again until Monday morning and I will be very glad to check them Monday morning before I come to Court.

The Court: Will you be able to check them so that you will be able to be here Monday morning on time?

The Witness: These two years I will be, yes, sir.

Mr. Helsell: Subject to objection as to its materiality, it is stipulated—

Mr. Oehler: And relevancy and competency.

Mr. Helsell: —it is stipulated that in suits brought against certain railroads at the same time, this suit was brought against the Illinois Central Railroad Company for the collection of omitted gross earnings taxes for the years 1922 to 1929, inclusive, the following amounts were involved and the following settlements were made:..

In the Canadian Northern suit for \$127,999.12, being the amount of tax produced by the State's original formula in the—

[fol. 216] Mr. Oehler: With or without penalty?

Mr. Helsell: —the amount of the tax without penalty, \$127,999.12—

Mr. Oehler: Let me see that a minute. (Paper handed counsel.)

Mr. Helsell: —and that the amount paid under the "Burlington formula" was, for the Canadian Northern, \$7,722.78.

Mr. Oehler: I just want to straighten this out. I want the Court to understand that I am only agreeing to these figures subject to their being competent, material and relevant and I want a ruling on it before they eventually go into the record. Does the Court understand my position? I concede these figures are correct, but whether they are properly in the record or not, I want a ruling on it.

The Court: I can't, at this time and at this stage of this trial, determine whether or not eventually they will prove to be material or not. I assume that they may possibly be upon the question of whether or not this formula is or is not operating inequitably or in a discriminatory manner and whether or not, under the theory adopted or urged by the taxpayer the formula violates its constitutional rights. It may be that these figures are material upon that issue and in view of that I will overrule the objection. (Plaintiff excepts.)

Mr. Helsell: (Continuing) That in addition to the stated amount of principal there was paid \$926.73 in interest, making a total paid by the Canadian Northern of \$8,649.51; [fol. 217] That under the formula pleaded in this action shown in the figures of the complaint, action was brought against the Chicago, Rock Island & Pacific Railroad Company to recover \$32,581.77, that there was actually paid under the "Burlington formula" the sum of \$35.83 principal and \$4.23 interest, or a total of \$40.06.

That in the action against the Chicago & North Western the amount claimed in the complaint was \$114,747.32, that there was paid under the "Burlington formula" \$17,744.41 principal and interest amounting to \$2,129.33, a total of \$19,873.76.

That in the action against the Green Bay & Western Railroad Company the amount sued for was \$4,047.58, the amount paid under the "Burlington formula" was \$294.44 principal with interest of \$35.33, a total of \$329.77.

That the amount claimed in the suit against the Duluth, South Shore and Atlantic was \$5,047.57, that there was paid under the "Burlington formula" \$108.96 principal, and interest \$13.08.

That in the action against the Chicago, Burlington & Quincy Railroad Company the suit was for \$131,630.58; settlement under the Burlington formula was for \$18,796.94 principal and interest of \$2,255.63, a total of \$21,052.57.

Mr. Oehler: May I identify these actions further by their file numbers in this Court and wherein judgments were entered? I want to do this without waiving my objections, but simply for the purpose of identification. The Northwestern file number is 212088; the file number against the [fol. 218] Green Bay and Western is 212089; against the Duluth South Shore and Atlantic the file number is 212090; against the Rock Island the file number is 212087; against the Burlington, 212086; against the Canadian Northern, the file number is 212092.

Mr. Helsell: May it be understood for the purpose of clarification of these figures that the amounts sued for in each case was the amount produced by the formula under which all of the liability of all of the roads was sought to be established, including the present case against the Illinois Central Railroad Company a sum of \$89,724.36, and that the amounts paid in principal are the amounts produced by the application of the "Burlington formula" and the interest

stated is interest at six percent from May 19, 1933, to May 1st, 1935.

Mr. Oehler: Again subject to its materiality, relevancy and competency, I will admit that actions were started against the roads named, including the defendant herein; that the amount due in the complaint in each instance was computed under what is described in the record in this case as the "State's formula", so-called. I will further admit, subject of course to the prior qualifications, that settlements were made with the roads named herein and the amounts in each instance were computed under the "Burlington formula". Have you got the Burlington stipulation?

Mr. Helsell: Yes, and I am about to ask you whether or not we can agree that the "Burlington formula", as shown in this stipulation, may be read into the record.

[fol. 219] The Court: The Burlington stipulation was marked as an exhibit, No. 20. It has not been offered or received.

Mr. Helsell: I thought perhaps we could avoid the need for offering the entire exhibit. We offer in evidence defendant's exhibit number 20, being the stipulation in settlement of the Burlington case.

Mr. Oehler: Objected to as incompetent, irrelevant and immaterial; no bearing upon the issues herein; not only not germane but entirely foreign.

Mr. Helsell: This exhibit is offered for two purposes: first, to show the "Burlington formula" as agreed to by the State, and second, to show the amount of taxes claimed by the State for the years in question from the Burlington, for the purpose of comparing that tax with the amount sought to be recovered and which is claimed is due from this defendant under the "Burlington formula".

The Court: Objection overruled. Exhibit received. (Plaintiff excepts.)

AXEL L. BERGSTROM, called as a witness for the defendant and after being duly sworn, testified as follows:

Direct examination.

By Mr. Helsell:

Q. You may state your name.

A. Axel L. Bergstrom.

Q. And you live where, Mr. Bergstrom?

A. St. Paul.

[fol. 220] Q. What is your occupation?

A. Corporate Examiner for the State under the Comptroller's office.

Q. Are you the same Axel Bergstrom who testified at the former trial of this case?

A. I am.

Q. You are still corporation examiner for the State?

A. Yes, sir.

Q. Working in the Comptroller's office, or out of his office?

A. Yes, sir.

Q. Are you the Bergstrom who was referred to by Mr. Boyle, Chairman of the Tax Commission, as the man who handles these railroad tax matters?

A. Yes, sir.

Q. You are, of course, familiar with the fact that seven roads were sued by the State to recover alleged omitted gross earnings from freight car per diem hire during the years 1922 to 1929?

A. I am.

Q. There were seven roads which have been named here and the figures given for the amount sought by the state in the several suits and the amount paid under the "Burlington formula". Those, with one exception, were the only roads sued?

Mr. Oehler: Just a minute. I object to that as immaterial, how many actions there were.

Mr. Helsell: Withdraw the question.

[fol. 221] Q. Did the formula then promulgated by the State, sought to be enforced, produce a tax against any other road in the State?

Mr. Oehler: Just a minute. Object to that as immaterial. That formula is no longer under consideration here.

The Court: I understand this question is directed to the "Burlington formula" or is it not?

Mr. Helsell: First I am trying to show, if the Court please, what roads would be taxed under the formula which the State apparently adopted or sought to enforce in the institution of these suits, then I want to show what roads the "Burlington formula" produces a tax on, for the purpose of tracing the—

The Court. What difference does it make what the consequences of a formula which has judicially been determined to be unlawful and which has been abandoned would produce?

Mr. Helsell: Well, in order that the Court may have the history of this tax controversy I suppose all of the formulas which the State has attempted to promulgate or enforce should be before the Court.

The Court: The one which was attempted to be promulgated but which has been judicially determined to be improper is actually before the Court now as a matter of record. Nothing is gained by proving that.

Mr. Helsell: Not as applied to the other roads, if the [fol. 222] Court please, and we think for comparative purposes, for purposes of comparison, that it will be helpful and material to prove how the formula known as the "State formula" or the "company formula" worked out.

The Court: I can't see its materiality. Either your present formula—or rather—or the Burlington formula is or is not an equitable one and more equitable than the one you now propose. The fact that it may be more or less equitable than one that has been abandoned does not appear to me to be material. (Defendant excepts.)

Q. I will ask you, Mr. Bergstrom, if the "Burlington formula" produced a tax against any roads other than these seven which were sued?

Mr. Oehler: Just a minute. I object to that as irrelevant, incompetent and immaterial for the years 1922 to 1929 inclusive.

The Court: Objection overruled. (Plaintiff excepts.)

A. It is my recollection that it does.

Q. What other roads?

A. Well, I couldn't mention all the other roads without having the figures before me. There were other roads, however, I know that, that were subject to the "Burlington formula".

Q. It produced a tax against the Great Northern and the Northern Pacific?

A. I think it did.

Q. Do you have in mind, approximately, the amount of

[fol. 223] tax the "Burlington formula" produced against those roads for these eight years?

Mr. Oehler: Object to that as incompetent, irrelevant and immaterial.

The Court: Objection overruled. (Plaintiff excepts.)

A. No, I haven't the amounts.

Q. Well, in round numbers, it produced a tax of approximately \$43,000.00 against each of those roads, did it not?

A. I couldn't say that without seeing the record.

Q. Did you make calculations at that time?

A. I assisted in making calculations.

Q. And wasn't the tax liability of the Great Northern and Northern Pacific settled at the time these other settlements were made?

Mr. Oehler: I object to that, if the Court please, as entirely irrelevant, incompetent and immaterial, what disposition the State may have made against a real or pretended claim against some other railroad, or whether it was made under the "Burlington formula", "State's formula" or what basis. For aught that appears there may have been extenuating circumstances of one nature or another, and I submit it is immaterial in this action what disposition the state made of claims against another road not even a party to this action.

Mr. Helsell: May I suggest this, we are relying on discrimination in this case and the purpose of this evidence is to prove that fact, if we can.

[fol. 224] The Court: You can't prove discrimination by a settlement. If the operation of the tax when applied produces a discriminatory result, that is one thing. But the fact that the State has reasons for making a settlement with one taxpayer which it doesn't make with another is not evidence of discrimination. Furthermore, discrimination cannot be proved by specific instances. It must be proved by the application of the rule or the application of the rule to similar property in general.

Mr. Helsell: We are seeking to show the application of this particular rule, that is, the "Burlington formula", to two of the largest roads in the State.

The Court: Your claim of discrimination as to the application of the formula would not be sustained by proof that

settlement was made with them on some basis other than the "Burlington" formula or on the "Burlington" formula.

Mr. Helsell: I agree with the Court's conclusion in that respect, but the purpose of showing the settlement was to show presumably what the tax produced. I am not claiming that they were favored. I am claiming that the amount of the settlement should show the amount of the tax produced. I will, perhaps, save a little time by asking another question.

Q. Can you tell with a reasonable degree of approximate correctness what this "Burlington" formula would produce, what amount of tax it would produce against those roads for the years 1922 to 1929?

[fol. 225] Mr. Oehler: I objected to it as indefinite, not knowing what "those roads" mean.

Mr. Helsell: I am referring to the Great Northern and Northern Pacific.

Mr. Oehler: Then I objected to it as incompetent, irrelevant and immaterial and the question is vague, indefinite and uncertain.

The Court: Well, as I recall the record thus far, it doesn't show that the formula was, in fact, applied to these roads, does it?

Q. The formula was applied, was it not, Mr. Bergstrom, to the tax liability of the other roads, including these seven which were sued and also the Great Northern and Northern Pacific?

Mr. Oehler: Just a minute. I object to that as calling for a conclusion of the witness.

The Court: Overruled. (Plaintiff excepts.)

A. I think it was, Mr. Helsell.

Q. You can tell pretty accurately, can you not, about how much tax that formula produced against these other roads—we have shown what it produced as to these seven?

Mr. Oehler: I object to that as incompetent, irrelevant and immaterial. Even if the Burlington formula, so-called, was applied to the roads involved, the amount of the tax is unimportant.

The Court: I don't know just how the amount of the tax eventually may be or may not be material to the proof of the [fol. 226] claim of inequality or discriminatory effect of the working of the formula in principle. I can't see it now. But that doesn't make the evidence immaterial. It may be

material; if eventually the Court determines it doesn't prove it that doesn't prove it is immaterial at the present time. Objection overruled. (Plaintiff excepts.)

A. Which road did you specifically mention?

Q. Let us take the Great Northern first.

A. If the "Burlington" formula was figured for the Great Northern, which I think it was, as a matter of fact, I haven't seen those records since the trial—but if the formula was figured for the Great Northern surely those figures are available, but I don't know the actual figure.

Q. You know within two or three thousand dollars?

A. No.

Q. Can you get those figures?

A. I am pretty sure I can.

Q. Will you do so?

A. I will be glad to.

Q. Can you get the figure for the Northern Pacific?

A. Of course I am relying on records produced by Mr. Varney.

Q. He was corporate examiner at that time?

A. He was the senior corporate examiner and I was assisting him.

[fol. 227] You will have a record of the settlement made with these two roads which will show the application of the "Burlington" formula?

Mr. Oehler: Just a minute. I object to that as calling for a settlement made with these two roads and I object to the witness stating he will or will not have it. It is immaterial whether he does or does not have it.

Mr. Helsell: I will withdraw the question asking him to produce figures as to the settlement.

Q. Will you produce the figures which show the amount of the tax against those two roads under the "Burlington" formula?

Mr. Oehler: I object to that as incompetent, irrelevant and immaterial, not germane to this matter, involving no party to this suit or any other suit. What the Tax Commission did in that or any other instance is not relevant and has no relation to the prosecution of this action.

The Court: Overruled. And the witness, when he appears Monday, if he can, will produce the information requested. (Plaintiff excepts.)

Q. Now we have named these seven roads, the Canadian Northern, the Rock Island, North Western, the Green Bay and Western, the Duluth, South Shore and Atlantic, the Burlington, the Illinois Central, and in addition we have the Great Northern and the Northern Pacific, making nine roads which would be taxed under the "Burlington" formula. Can you think of any other?

A. You mean during that period?

[fol. 228] Q. Yes, during the period from 1922 to 1929, would the "Burlington" formula produce a tax against any other roads?

A. I don't think so.

Q. There are twenty-seven or twenty-eight roads in the State of Minnesota, operating here, which inter-change freight cars?

A. Approximately that number.

Q. You did, prior to the institution of these several suits, make a special check of the roads in the State with reference to per diem earnings to ascertain which of them would be taxed under the "Burlington" formula?

A. I assisted Mr. Varney in that compilation of those figures, yes, sir.

By Mr. Oehler:

Q. Was that under the "Burlington" formula or "State's" formula you made that search?

Q. At the time the suits were brought, Mr. Bergstrom, it is true, is it not, that you were making a check of the roads to ascertain which of them would be taxable under the complaint or the then "State's" formula? That is true, is it not?

A. Yes.

Q. And afterwards, at the time the settlements came up and the settlements were effected and the "Burlington" formula was applied, you made a check of the roads and a study of the roads to determine what roads in the State would be taxed under the "Burlington" formula?

[fol. 229] A. That is my understanding.

Q. These nine are the only ones you found would be taxed?

A. As far as I know, yes.

Q. There are a number of other roads in the State, I believe, the Milwaukee, for instance, which has very substantial mileage in the State, is that not true?

A. Yes.

Q. Some 1,357 miles, the Milwaukee has in Minnesota, is that about right?

A. I don't know the exact mileage, but they have a lot of mileage in Minnesota.

Q. Has a large amount of property in this State?

Mr. Oehler: Object to that as irrelevant and immaterial.

The Court: Overruled. (Plaintiff excepts.)

Q. (Continued) Terminals, round houses, right of way—

A. They have some property, I don't know just how much.

Q. They have over one thousand miles of railroad, you are sure of that?

Mr. Oehler: Are you testifying?

Mr. Helsell: I am asking him.

Mr. Oehler: He is your own witness. Don't lead him. [fol. 230] The Court: You may answer. (Plaintiff excepts.)

A. Reasonably sure, yes, sir.

The Court: Most of these things, Mr. Oehler, as I understand it, are matters about which there isn't any dispute, but simply is a matter of getting them into the record for whatever benefit they may have for the taxpayer. The question of leading the witness is not important. Proceed.

Q. I ask you to examine this paper which the reporter has identified as Exhibit 22, and ask you to examine the list of railroads named in the first column and what purports to be a statement of the mileage in the State of Minnesota in the second column, and ask you to state whether or not that is substantially correct, from your general knowledge of the railroads here in the State?

A. That is hard to say. We have accepted the railroads' figures on most of these instances, but I couldn't make that verification without the actual mileage before me.

Q. Will you, Mr. Bergstrom, by Monday morning at ten o'clock, check your records of railroad mileage in the State and be able to tell the Court at that time whether those mileages are correct?

A. That is a big job. We have no records in our office as to the mileage. Possibly the Railroad and Warehouse Commission has, I don't know.

The Court: Do these maps in evidence, do they show any mileage?

Mr. Helsell: The Illinois Central mileage, I believe, is all.

[fol. 231] The Court: Perhaps one of the recent reports of the Railroad and Warehouse Commission gives that information.

Q. Do you know whether it does or not?

A. I am not positive, it probably does.

Q. Can we impose on you to find out for us whether those figures are accurate or not?

A. I will be glad to do that if I am given sufficient time.

Q. Do you know, of these nine roads against which the "Burlington" formula produces a tax, is there any road in the State against which it produces a tax as large as that against the Illinois Central?

Mr. Oehler: Just a minute. I object to that as immaterial, the size of the tax may be imposed against any road without taking into consideration other elements. The answer could be decidedly misleading.

The Court: I suppose that the amount of the tax for any particular year per se is not any evidence of discrimination or inequality. So many other elements perhaps enter into it that I don't know whether it is material or not.

Mr. Oehler: This witness has not shown to be qualified as to the physical property of the various roads involved here, as to their terminal facilities or otherwise.

The Court: My understanding is that you now have in the record a statement as to the actual amount for which settlement was made on the "Burlington" formula.

[fol. 232] Mr. Helsell: I think that is true, except for two roads.

The Court: I suppose you are going to get information as to track mileage, at least I understand that is what you have asked this witness for, which may or may not be material, and I don't know what further information you propose to produce, but I am not at all clear that this particular question would be helpful. (Defendant excepts.)

Q. Do you know, Mr. Bergstrom, whether there is, in your office, any record which shows the valuation of the property of the railroads in the State of Minnesota?

A. Not in our office, no sir.

Q. Is there in the office of the Railroad and Warehouse Commission?

A. Well, I don't know.

Q. Is it true this "Burlington" formula, like the formula in the complaint tends to produce a larger tax against the roads having the smaller mileage in the State?

Mr. Oehler: I object to that as incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

The Court: Well, I am not clear whether it is material or not but for the present at any rate I will overrule the objection. (Plaintiff excepts.)

A. Well, I couldn't say that. It depends upon the interchange of equipment.

Q. You will recall, Mr. Bergstrom, testifying at the for-[fol. 233] mer trial that if a road had more than thirteen per cent of its mileage in the State of Minnesota it would not be taxed under the then formula, that is, under the formula set forth or resulting from the figures set-out in the complaint. Now, what is the effect in that respect applying the Burlington formula? Have you made any—

The Court: Let me say to the witness, after counsel has concluded his question, pause long enough to give counsel for the State an opportunity to make an objection, then it won't be necessary for counsel to hurry to make his objection.

Q. (Continued) —study to determine what percentage of mileage in Minnesota would exempt a railroad from taxation under the "Burlington" formula?

A. No, we have not.

Q. From your knowledge of the formula and its application to these roads which you have checked, would you say that relatively the same thing is true of the "Burlington" formula, that in many instances, where the amount of mileage of the railroad in Minnesota was considered, that is the percentage of its mileage in Minnesota was considerable, there would be no tax?

A. No, I couldn't say that because again it depends upon the interchange of equipment.

Q. Well, of course, it depends on the interchange of equipment, but the "Burlington" formula, does it not provide a larger offset, or allow a larger offset to those roads

which have a substantial amount of their mileage in Minnesota? Is that true?

[fol. 234] Mr. Oehler: Objected to as argumentative.

The Court: Overruled. (Plaintiff excepts.)

A. The roads with larger mileage have greater offsets due to their larger mileage.

The Court: How does that work out? I don't understand how that should be.

A. It is because of their greater mileage in Minnesota that they have a higher per cent—that is, the loaded freight car miles I am assuming—

The Court: He is talking of track mileage, I assume.

A. Well, track miles in this instance would mean the amount of revenue earned in Minnesota. The greater revenue earned in Minnesota, it is presumed the heavier the loads in Minnesota, the more of them. In other words, the heavy trackage in Minnesota would have a tendency to produce heavier haul in Minnesota because that road has more mileage.

The Court: Would the effect of that be so that there would be less likelihood of using freight cars, is that the effect of it?

A. No, a road with a heavy mileage in Minnesota could rent quite a bit of equipment. It depends upon where the equipment is needed and how much they have of their own within the boundaries.

The Court: I see. The tax, if I understand it correctly then, the result is that the using road, when it is a reporting road it would report the amount that it is paying to another [fol. 235] road for the use of its cars as a debit?

A. That is right.

The Court: And, therefore, it might completely wipe out any taxable return?

A. That is true.

Q. For the purpose of illustration, Mr. Bergstrom: Under the "Burlington" formula might not this situation exist. Let us assume that there are ten roads, each of which has exactly the same number of debits and exactly

the same number of credits—that is, by debits I mean it owes other roads for the use of cars the same number of day units, and by credits, it has from other roads the same number of credits—

Mr. Helsell: Withdraw that question.

Q. Might it not be true under the “Burlington” formula two roads with exactly the same number of debits and credits for the particular reporting period under their freight car per diem accounting would, because of the respective mileage of the two roads, produce a result where one would have a tax to pay and the other would not?

A. That is true.

Q. And each of them might have exactly the same credit balance, that is, we will say for purposes of illustration, \$100,000.00 credit balance of freight car per diem earnings, gross earnings, and one would pay a tax under the Burlington formula and the other one might not pay a tax under the [fol. 236] “Burlington” formula because of the fact of its greater mileage in the State?

A. If it results in a credit balance both roads would be subject to tax. The credit balance—the net result of the credit balance is always taxed?

Q. Yes, but in determining whether it had a credit balance that would artificially be determined under the “Burlington” formula by charging the reporting road with that percentage of its credits equal to the using line’s mileage in the State and it would get credit for payments it made, or offsetting allowances equal only to the percentage of the reporting road or owner road’s mileage in the State, that is true?

A. That is true.

Q. There is then, under the “Burlington” formula, no direct relationship between the length of the road or the total amount of business a road does in the State, and the amount of the tax computed under that formula, is that true?

Mr. Oehler: I object to that as leading and calling for a conclusion of the witness.

The Court: Overruled. (Plaintiff excepts.)

A. Well, I don’t just understand your question.

Q. I can make it plainer, I believe. There is no relationship, relative relationship between the amount of a road’s

mileage of track and the amount of business it does on that track and the amount of tax produced by this "Burlington" formula?

A. Only insofar as it is presumed a road with a heavy [fol. 237] trackage in Minnesota would naturally operate more cars over their tracks.

Q. Let us take, for example, the Milwaukee with its thirteen hundred miles of road, it obviously, and you know it as a fact, that it does a great deal more business in the State than the Illinois Central Railroad with its thirty miles of track, that is true, is it not?

Mr. Oehler: I object to the form of the question as both argumentative and leading.

Mr. Helsell: It is simply preliminary, to presume that the man knows.

The Court: It is leading in one sense, but it isn't leading in the sense that is misleading or that this witness is being trapped into saying something he otherwise wouldn't say. I think on this kind of a hearing, bringing the matter directly to the attention of the witness by a question of that kind is leading in form but not in substance. I think he may answer. (Plaintiff excepts.)

A. It is.

Q. And it is true that this "Burlington" formula produces no tax against the Milwaukee?

A. I haven't had a chance—you mean under the old period?

Q. Yes, sir, from 1922 to 1929?

A. I think not.

Mr. Oehler: Under what formula?

Mr. Helsell: Under the "Burlington" formula.

[fol. 238] Q. Nor is there any relationship between the relative amount of property which the roads have in the State and the tax burden under the "Burlington" formula, is that true?

Mr. Oehler: I object to that as calling for a conclusion and leading. It is not shown this witness knows the extent of the railroads in Minnesota.

The Court: On its face, it seems to me, the question is not exactly accurate. Of course, rolling stock or freight cars is property within the State and it would seem to me, on

its face, that the amount of cars that are leased that are within the State might have some bearing on the tax.

Q. Perhaps I should distinguish in the question between rolling stock and other property. A different tax is contemplated by the Minnesota statute. Disregarding for the purpose of this question the rolling stock, it is true, is it not, Mr. Bergstrom, that there is no relation between the amount of the tax produced by the "Burlington" formula and the amount of other railroad property any company may have in the State?

Mr. Oehler: I object to that as incompetent, irrelevant and immaterial and asking the witness to discard, to ignore, the very thing we are seeking to tax here, namely, rolling stock.

The Court: I suppose the purpose of counsel is to demonstrate as a matter of record, if he can, that the gross earnings tax as a lien tax, or lien of property tax, under the "Burlington" formula fails to be such a tax—or rather violates a principle of equality and uniformity in its actual application and whether this information tends to prove [fol. 239] that or not I can't say at this time. Objection overruled. (Plaintiff excepts.)

A. That is true.

The Court: We will resume this trial at ten o'clock, but the adjournment is until nine o'clock Monday.

Whereupon, an adjournment was taken until ten o'clock, Monday, January 17, 1938.

Monday, January 17, 1938, ten o'clock A. M., Court convened and trial resumed pursuant to adjournment and the following proceedings were had:

NICHOLAS A. NELSON, a witness heretofore called and duly sworn on behalf of the defendant, was recalled and testified as follows:

Direct examination (continued).

By Mr. Helsell:

Q. Did you complete your check of the returns made by the roads which are operating in Minnesota for 1936?

A. In 1935 and 1936, both, yes, sir.

Q. You have that statement I handed you?

A. Yes, sir.

Q. Did you find that Mr. Gareiss, or whoever prepared this tabulation, had deducted the passenger cars?

Mr. Oehler: Just a minute. I object to the witness being [fol. 240] examined as to any statement not in evidence or any proposed exhibit not in evidence.

Mr. Helsell: We will find out what it is first. Do you know what this is?

Mr. Oehler: No.

The Court: I don't know whether this question is—it isn't necessarily a question as to the contents of the tabulation. It is a statement as to what he found, a statement of fact, not what he didn't find. I presume he may answer that. Objection overruled. (Plaintiff excepts.)

A. The only thing I did was to examine the companies' reports as to the credit balances to see whether or not they were all on the record which I had.

Q. What did you find?

A. I found that your list compared with the reports returned.

Q. And when you say "compared with the reports" you mean that these figures shown on exhibit number 21 correctly reflect the per diem credit balances of the several roads for that year.

A. I do not.

Q. What do you say as to that?

A. My understanding was that I was to find out whether, or not all of these roads had reported or whether any other roads had reported—I didn't check them as to accuracy, no, sir.

Q. Well, you did find that the roads shown on this exhibit [fol. 241] 21 as having reported did, in fact, report?

A. Yes, sir.

Q. And the roads which on this exhibit have no figures opposite their names did not report?

A. Did not report on the credit balances, as I understand them.

Q. In other words, all of the roads shown on this exhibit opposite whose names there are no figures made no per diem reports for the years 1935 or 1936 in the State of Minnesota?

Mr. Oehler: Just a minute. I object to that as incompetent, irrelevant and immaterial whether certain roads did or did not report. There is no showing to date that they were under any obligation to report under any formula proposed here or elsewhere.

The Court: Objection overruled. (Plaintiff excepts.)

A. I only looked over the reports as to reporting roads and not as to what was reported with reference to them. Now, if I may, off the record, if I may make a statement which probably shouldn't go into the record—

The Court: Any statement you make in the hearing of the Court should go into the record.

Mr. Oehler: I suggest you don't make any statement except in response to questions.

Q. Your answer, Mr. Nelson, was not entirely responsive [fol. 242] to my question. I said, is it a fact that the roads shown on this list opposite whose names there are no figures did not make any reports to the State of Minnesota for the years 1935 and 1936 for per diem earnings?

Mr. Oehler: Same objection as before, Your Honor.

The Court: Same ruling. (Plaintiff excepts.)

A. Not knowing what you refer to I can't say, not knowing what goes into the credit balances. Perhaps that is the best answer I can make.

Q. I am afraid, if you understand my question, that doesn't answer it. Examine this exhibit number 21, if you please. Now, certain roads are shown to have made returns?

A. Correct.

Q. And the amount of those returns are shown?

A. Correct.

Mr. Oehler: Just a minute. I object to counsel explaining an exhibit not in evidence and asking this witness to testify as to a material matter from an exhibit not in evidence.

The Court: I am sort of assuming, perhaps I haven't any right to, but I am assuming that the exhibit will be placed in evidence and that he is apparently attempting to lay a foundation for its admission. Perhaps that assumption is wrong. If it is you can subsequently move to have the evidence stricken. Proceed. (Plaintiff excepts.)

[fol. 243] Mr. Helsell: The Court is correct. We will offer the exhibit if we can find information in the office of the Tax Commission to prove its authenticity.

Q. Let us start again on this: There are certain roads named in this list, on Exhibit 21?

A. Yes, sir.

Q. Who do not appear to have made any return of per diem earnings?

A. Correct.

Q. Those roads did not, in fact, as the records of your office indicate, make any return of per diem earnings for those years, is that true?

The Court: Answer it as best you can. If you can't answer it "yes" or "no", answer it in such a qualifying form as you think it should be from your investigation.

A. There are certain earnings reported by certain roads for certain earnings that are not reflected in this report, sir; that is the best answer I can make.

Q. By that you mean, Mr. Nelson, that other railroads in the State did report to the State, and did for these years report to the State their gross earnings, but you do not mean that the roads which, on this list, show no figures, made any report of freight car per diem earnings?

A. Freight car per diem earnings, no, sir, they did not.

Q. That is what I was getting at?

[fol. 244] A. Yes, sir.

Q. So, it is true, is it not, that your records show that all of the railroads in the State of Minnesota on this list opposite whose names there are no figures did not report any freight car per diem earnings?

A. Yes, sir.

Mr. Oehler: I move that answer may be stricken. Object to the form of the question as both leading and argumentative and putting words in the witness' mouth.

The Court: Objection overruled. Now, you may answer. (Plaintiff excepts.)

A. I did not find any omitted freight car earnings in any of the reports that are not reflected in this list.

Q. Now, let us get the figures themselves of these roads which did report. You say you did or did not check the accuracy of these figures?

A. No, sir, I did not.

Q. Did you understand, last week, that I asked you to check your records to determine what roads had reported in those years and whether these figures were correct?

Mr. Oehler: I object to that as immaterial, if the Court please.

The Court: Objection overruled. (Plaintiff excepts.) [fol. 245] A. I understood that I was to check the roads that had reported their credit balances.

Q. Yes, sir. Was that all you intended to answer?

A. That is as far as I went.

Q. Did you check the credit balances of the roads which did report?

Mr. Oehler: Just a minute, if the Court please. I submit this line of questioning is entirely incompetent, irrelevant and immaterial until it is disclosed as upon what basis or what formula these roads, if any, may have made returns of per diem credits. It is entirely beside the point whether they did or did not until such matter may be shown.

The Court: Well, things have to be shown in some sort of order. They can't all be shown at once. If such evidence is necessary to make it material then, of course, the failure to produce that evidence will render the evidence immaterial and useless to the defendant. If, on the other hand, it is supplemented by such evidence then there isn't much gained by the question of the order of proof. Objection overruled. (Plaintiff excepts.)

A. I have never checked any report of gross earnings made by any railroad company on any item of earnings.

Q. You mean by that, Mr. Nelson, you have not undertaken to ascertain whether or not the reports as made were correctly made?

Mr. Oehler: I object to that as leading, if the Court please. The witness makes one statement, then counsel attempts to [fol. 246] interpret his answer by saying "you mean". I submit, if Your Honor please, it is decidedly improper and misleading and leading.

Q. Is that what you mean?

Mr. Oehler: Just a minute until I get a ruling.

The Court: I am inclined to think, Mr. Oehler, that this witness is quite capable of taking care of himself and won't

be trapped into making any unwary admissions or unconscious admissions, and if the evidence is material at all I am not very much interested in how it is brought into the record. This is a public official and this, I suppose, is or is not in line with his duties—or what he did at any rate, and I presume he can be questioned as to what his records show.

Mr. Oehler: I agree with that. But I submit counsel may not state "you mean" this or that in interrogating the witness. That is my objection. He has done that invariably.

The Court: Well, it is a short cut and it is not a case—I don't believe that there is any danger this witness will be led into some misstatement by the form of the question.

Mr. Oehler: This is his own witness. Certainly, upon the face of the record, it is his own witness.

The Court: Even assuming it to be his own witness, he is also a public official. These questions relate to records in his custody and what he has or has not done as a public [fol. 247] official and I don't think the form of the question is very material. Proceed. (Plaintiff excepts.)

A. I will answer your question, Mr. Attorney, in this way: The examination of reports of this character are not made by me, never have been made by me. They are reports that I wouldn't feel capable of examining without knowing what I was doing.

Q. In other words, it is the duty of the Corporate Examiner to check the reports of the several railroad companies to determine their accuracy, is that right?

Mr. Oehler: Just a minute. With all due apology to the Court, again I object to the form of the question, with all due apology to the Court's ruling.

The Court: You don't need to apologize. You are entitled to conduct the litigation as you think your client's interests warrant. Objection overruled. (Plaintiff excepts.)

A. The reports that are made to the Tax Commission, as made to the Tax Commission, are examined in our office. As to the accuracy of the return made by the company the accuracy of that return is made under the Public Examiner's Department. Does that answer your question?

Mr. Helsell: I think so.

Q. I am not at all concerned with the accuracy of these figures. Is it true, however, that you do have records in your office, of which you have the custody and control,

which show whether or not these named roads did make these returns?

[fol. 248] A. Yes, sir.

Mr. Oehler: Just a minute. I object to the question as incompetent, irrelevant and immaterial until such showing is made as to the basis upon which the returns were made or what items they may have covered, Your Honor.

The Court: Your point may be well taken when it comes to a question of finally submitting the issue, that the evidence has not been tied into the record, probably. But, as I said once before, this may be just one step in a chain of proof and it has, the proof, has to be introduced one step at a time.

Objection overruled. (Plaintiff excepts.)

Q. Did you make such an examination of your records as will enable you to tell the Court whether those returns were, in fact, made by those companies for those years?

Mr. Oehler: Same objection.

The Court: Objection overruled. (Plaintiff excepts.)

A. I have the records here which I examined between Friday and last evening.

Q. And what is the fact as to whether or not those returns were made as shown on that statement?

Mr. Oehler: Same objection.

The Court: I am not sure that I understand your question. Do you mean whether the return as made corresponds in dollars and cents with the figures on exhibit 21?

[fol. 249] Mr. Helsell: Yes, sir.

The Court: Well, he has already said he didn't examine the records as to amounts and he couldn't testify as to that. At least that is what I understood him to say, but you may ask him again.

(Plaintiff excepts.)

Mr. Helsell: Part of the time he and I have been talking about different things and that has made it a little doubtful in my mind as to what he has answered.

A. The returns are here showing that these reports were made, but as to the accuracy of the amount stated I am unable to testify.

Q. I am not sure now, Mr. Nelson, whether I understand what you mean when you say "as to the accuracy". Let me ask you this: Do you mean you do not know whether the railroad companies correctly computed their per diem accounts, or do you mean, on the other hand, that you don't know whether the amounts shown on this exhibit correspond to the reports of the companies as they are now on file in your office?

Mr. Oehler: I object to the question, the form thereof, and the use of the exhibit at this time, more particularly insofar as per diem accounts are concerned. If I remember correctly, these items have not been specifically identified as per diem accounts.

The Court: Objection overruled. (Plaintiff excepts.)

A. I have stated several times that I have not examined these figures as to the accuracy of the figures because I [fol. 250] did not understand just what was reported.

The Court: The question, Mr. Nelson, that you are now asked is this: In the reports made by the companies that made reports as to freight car per diem, were the amounts there reported the same as the amounts that they are represented to have been in this exhibit 21, or don't you know whether the exhibit 21 correctly represents the amounts in the reports? That has nothing to do with the accuracy of the original reports, of course.

A. Again, Your Honor, I will answer it by saying that there are certain figures in the reports as made which I do not understand; which I could not justify or reconcile; and I wouldn't attempt to answer that question in any other way than by saying that I have not gone into the accuracy of those figures because of my inability to do so.

Q. Do you mean to say, Mr. Nelson, that you cannot tell the Court whether these figures are the same figures as are in the reports?

Mr. Oehler: I object to that as argumentative.

The Court: You had better find out whether he did attempt to find the figures. Did you attempt to find in the original reports any figures corresponding to the figures in Exhibit 21?

A. I did, Your Honor.

The Court: And did you find such corresponding figures, or did you not?

[fol. 251] A. By reason of my lack of understanding of the debits and credits I was unable to ascertain the correctness of the figures stated in this exhibit.

The Court: If I may express it then, as I understand it: I understand you are testifying that you were unable to make such a comparison of the reports with Exhibit 21 as to be able to say that the figures in Exhibit 21 correspond with any figures in the reports?

A. Your Honor, I tried to ascertain from the debit and credit balances in two or three instances whether or not the reports were correct and in those two or three instances I was unable to understand how the figures were arrived at because of my—perhaps, because of my incompetency.

The Court: The question is, did you or did you not find comparable figures? If you did not that ends it.

A. I could not find comparable figures from any computation I made. I couldn't reconcile them.

The Court: I think that answers your question.

Mr. Helsell: If the Court please, I am just wondering what is the most expeditious way of handling this. Those are figures for eight roads which made returns in 1936 and it ought to take not longer than five minutes for us to agree that they are or are not the figures shown in the returns of these roads. We ought to cover it in a stipulation in three minutes time and we have been two half days. I would like to ask the witness if he could take these reports and check those eight figures for those eight roads each year [fol. 252] and tell whether they are the same figures. The difficulty the witness is having is, he claims he is not able to determine whether or not they are correct, and I think he means by that whether the computations are correct. But surely anyone, a seven-year-old boy, can tell whether these are the same figures.

Mr. Ochler: I move the remarks of counsel be stricken from the record as highly improper. He is attempting to cross examine and is belittling the intelligence of his own witness.

The Court: I don't think that there is—

Mr. Helsell: I object to that statement being made.

The Court: Counsel was arguing with the Court and I suppose that in discussing the evidence or discussing the method of producing evidence counsel should have unrestricted freedom of expression.

Mr. Oehler: While the witness is on the stand?

The Court: The motion is denied. (Plaintiff excepts.)

Q. Will you find for us, Mr. Nelson, the Canadian Northern reports for 1935 and 1936?

Mr. Helsell: Off the record, do you think this witness could save any time by taking this exhibit and—

Mr. Oehler: You handle that any way you want.

[fol. 253] Mr. Helsell: I am asking you.

Mr. Oehler: And I am telling you, handle it any way you want. He is your witness, not my witness.

A. This is one, this is one and—

The Court: Those that you say are "one" you had better specify what road and what figure you find correct, then we will make some progress.

A. (Continued) For the period ending December 31, 1936—I am a year ahead, I guess. Perhaps I had better take 1935 first.

The Court: It doesn't make any difference.

Mr. Oehler: May I again suggest, if the Court please, until such time as it may be shown under what formula or basis, if any, these per diem returns have been made by the various roads involved, that the entire questions continue to remain incompetent, immaterial and irrelevant.

The Court: The record will show your objection. Objection overruled. (Plaintiff excepts.)

A. For the period ending December 31, 1936, the Canadian Northern Railway reported, for the last six months of 1936, the sum of \$22,585.03, which, according to the figures on this sheet, corresponds.

Q. By "this sheet" you mean Exhibit 21, is that right?

A. I suppose that is what it is.

Q. Let us be sure.

A. Yes, sir, that is marked Exhibit 21.

[fol. 254] Mr. Oehler: Let me see that exhibit just a minute. I want to see what heading it has. May I ask the witness a question, if the Court please?

The Court: Yes.

By Mr. Oehler:

Q. Those figures you were reading, are those per diem returns or general returns, Mr. Nelson?

A. They are marked on the report as "Credit balance, Freight Cars in Transportation Service"—nothing to indicate whether they are per diem reports or what they may be, sir.

By Mr. Oehler:

Q. As far as that return shows, that may be on a mileage basis?

A. I couldn't tell you what they are, Mr. Oehler.

Q. You find in the report which you have in your hand the item in the first column, "Gross Earnings from" down to 22, which is "Hire of Equipment", do you not? Do you find that on the form of report which was used by the Canadian Northern for that year, is that true?

A. Yes, sir. I find that is true.

Q. And 22-A is the credit balance of freight cars in transportation service?

A. Yes, sir.

Q. And 23-B is the credit balance of passenger cars in transportation service?

A. Correct.

Q. These figures which you have said correspond with those on the exhibit are opposite the item, "Hire of Equipment" [fol. 255] Credit Balance Freight Cars in Transportation Service?

A. Yes, sir, I have so testified.

Q. Will you make the examination for the same road for the other year, please?

Mr. Oehler: If the Court please, I would like to supplement by a further objection by showing that these returns in this present testimony relates to a period of time not involved in this litigation, namely, if I understand correctly, he has been testifying from reports for the year 1936 and this litigation, if Your Honor please, relates to the years 1922 to 1929, inclusive. For aught that appears there may

have been a change in the law since then and I submit it is entirely incompetent, irrelevant and immaterial.

The Court: Mr. Oehler, you have made your point several times that you have considered the evidence irrelevant and immaterial and the Court has expressed its views that it doesn't agree with you. I don't think anything is gained in persisting in reiterating the objection. I think something might be gained by letting evidence in in the most expeditious and most orderly manner and then assume that the Court will have the ability to discriminate between what is and what is not material, or what has or has not probative effect, and if the District Court can't the Supreme Court can.

Mr. Oehler: But, as to the period of time involved, if the Court please—

The Court: I don't know whether this proof will or will not have any probative value. Perhaps it may. There [fol. 256] may be reasons why they have to resort to this. I can't pre-judge the case in advance, when it frequently happens in litigation that evidence is offered and the Court can't see its materiality at the time but subsequently when all the evidence is in it forms a pattern which has some probative value. The question of the materiality is a rather difficult question to answer as evidence comes in piece-meal. Sometimes something that seems to have almost no materiality may subsequently prove quite valuable in guiding the Court. I am not in a position to pass judgment at this time. I prefer to let the evidence in and then weigh it as to what effect it will have when it is all in and I can see it as a whole.

Mr. Oehler: But, again reiterating, this relates to something which transpired six or seven years after the period of time involved here.

The Court: It may still be material if it bears upon the same type of income and the same method of ascertaining the taxable portion of it, involving the same principles. It may be the only evidence that is readily available.

Mr. Oehler: I have urged other objections to that, to date there has been no showing as to the basis on which these returns, if any, were computed.

Mr. Helsell: May I make just a brief statement?

Mr. Oehler: It seems to me that in the present situation it is entirely foreign to the issues. The Court knows I

don't want to be argumentative about it, but it seems to me that it should be——

[fol. 257] The Court: You are asking me to pass upon the probative value of evidence which I am unable to do and I rely upon counsel to some extent on not going too far afield, and I also feel counsel should have the right to offer evidence which they think will have any probative value and if it hasn't, you will have to take your chance on the District Court or the Supreme Court being able to see your point. (Plaintiff excepts.)

A. The same road, Canadian Northern Railway Company, for the year 1935 reports in the same manner under gross earnings from hire of equipment, item 22-A, "Credit Balance, Freight Cars in Transportation Service"; \$9,-246.26, which compares with the report, or with the exhibit numbered 21.

Q. When you say it compared with the exhibit, you mean the figure is identical?

A. Identical, yes, sir.

Q. Will you take the next item?

The Court: Is there any objection, Mr. Oehler, to having the witness make these comparisons at a recess and then receiving the conclusions of the witness after he has made the comparison subject to all of your objections?

Mr. Oehler: None whatsoever.

The Court: The Court will take a fifteen-minute recess while this comparison is being made.

Mr. Oehler: As far as I am concerned, he may do it at noon.

The Court: I don't know whether you are prepared to [fol. 258] go on with some other specie of proof now?

Mr. Helsell: If the witness will be excused we can go ahead with other evidence. I thought he was going to do that.

The Witness: Pardon me just a moment——

Mr. Oehler: No. Volunteer no information.

The Court: Are you able to continue to make these comparisons so that you can state whether or not these figures are or are not the same when you get through?

A. I am not, Your Honor. The Burlington & Quincy return, which is next, is a return which I endeavored to reconcile as to dollars and cents and couldn't do it because I don't know just where the deduction is made.

The Court: Are there any other figures besides the Burlington & Quincy?

A. Yes, sir, there are several reports of similar character.

The Court: By other roads?

A. Yes, sir.

The Court: How far could you go? How many roads were there that you couldn't compare?

A. I think that my recollection is that there are three or four or five that I couldn't.

The Court: Then there isn't much gained.

Q. Are you willing to do this, compare your records with the assistance of Mr. Gareiss, our accountant, who prepared [fol. 259] exhibit 21 and see how far you can reconcile the figures?

A. I am.

Q. Will you do that?

A. Yes, sir, gladly.

Witness excused, temporarily.

AXEL E. BERGSTROM, a witness heretofore called and duly sworn on behalf of the defendant, resumed the stand and testified as follows:

Direct examination (continued).

By Mr. Helsell:

Q. You are the same Mr. Bergstrom who testified before in the case?

A. I am.

Q. Did you check that list of Minnesota roads and the figures opposite each showing, or purporting to show, their mileage in Minnesota?

A. I did.

Q. Do you have that with you, the statement?

A. Yes, I have, I will have to get it.

Q. Did you find those figures correct?

A. No, they vary, but, of course, as I understand your statement there this is for average miles. Just what do you mean by that?

Q. And they vary in the several years?

A. I made the comparison on the 1935 and 1936 report of [fol. 260] the Railroad & Warehouse Commission and of course it is possible they will vary over the period.

Q. Well, now, passing that for the present. I call your attention to the table which is found at pages 423 and 424 of the official report of the Railroad & Warehouse Commission of the State of Minnesota for 1929-1930 and ask you to examine that and state whether or not it does show the mileage of the several roads in the state?

A. Yes, it does.

Q. This is the report you used in making your check?

A. Not for this year. What year have you here? 1929, No, I used 1935 and 1936—a similar report.

Q. A similar report?

A. A similar report, yes.

Mr. Helsell: Defendant offers in evidence table 1 of the Railroad and Warehouse Commission report, being the 41st biennial report of the Commission and found at pages 423 and 424 of the report for 1929-1930.

Mr. Oehler: Objected to as not the best evidence. If the Court please, the state desires to object to that on the ground that it is not the best evidence, and, secondly, the mileage is incompetent, irrelevant and immaterial at this stage of the proceedings, the mileage of the various roads referred to therein.

The Court: What do you mean by it is not the best evidence?

[fol. 261] Mr. Oehler: Well, there is no assurance that it was accurately computed.

The Court: It is an official report, is it not?

Mr. Oehler: That is true, yes. Your Honor.

The Court: Objection overruled. Exhibit received. (plaintiff excepts.)

Q. Your attention is called to exhibits 24 and 24-A, pages 540 and 541 of the 41st report of the Railroad and Warehouse Commission, which is the table for the year ended December 31, 1935. That is the official report of the Commission, is it, Mr. Bergstrom?

A. I take it that it is, yes.

Mr. Helsell: We offer in evidence Exhibits 24 and 24-A, the mileage for 1935.

Mr. Oehler: Same objection.

The Court: Objection overruled. It may be received. (Plaintiff excepts.) If I understand it correctly, exhibit 23 includes pages 423 and 424, and exhibit 24 comprises simply page 540.

Mr. Helsell: That is right, yes, sir,—that is my error, if the Court please, and the exhibit will have to be corrected. Defendant's exhibit 24, so marked here, Mr. Bergstrom, shows the mileage for the entire lines of all these roads for the year ended December 31, 1935. That is true, is it?

A. It so states, yes, sir.

Q. Exhibit 24-A, what does that show?

A. Miles of road operated in the State of Minnesota for the year ended December 31, 1935.

[fol. 262] The Court: In order that there may be no mistake as to the record, I understand 24 and 24-A are offered, are objected to and are received over the objections.

Mr. Oehler: Upon the grounds heretofore indicated.

The Court: Correct.

Mr. Oehler: I will consent that the book reflecting the mileage, or the figures set forth in the volume for the year 1921 may be regarded as and for the year 1922, subject to all the varied and numerous objections heretofore made.

Mr. Helsell: Defendant offers in evidence its exhibit 25, being page — being a table shown on page 587 of the 37th report of the Railroad & Warehouse Commission of the State of Minnesota which purports to show the total system mileage and the mileage of Minnesota of the roads for the year 1921.

Mr. Oehler: Same objection.

The Court: Received. (Plaintiff excepts.)

Q. In performing your duties as Corporate Examiner do you have occasion to check the gross earnings returns of the railroads on freight car per diem?

A. I do.

Q. Since the State vs. Great Northern case was decided by the Supreme Court of Minnesota no per diem tax has been collected from those roads which do not have lines in the State of Minnesota, that is true, is it not?

[fol. 263] A. That is true, yes, sir.

Q. Prior to the decision in that case the credits from roads not operating in the State of Minnesota had been included in the returns of the roads?

Mr. Oehler: Just a minute. I object to that as incompetent, irrelevant and immaterial.

The Court: I don't quite see the materiality.

Mr. Helsell: Our contention, if the Court please, is that if this is a tax on freight cars and not upon property generally in the state, we are in the same position as are the roads which do not operate in the State. That is, our property must be taxed on the same basis and ~~that we are no~~ more subject to taxation simply because our cars may be in the state and on the line of some other roads than are these other companies whose cars are likewise in the state on the line of other roads.

The Court: Objection sustained. (Defendant excepts.)

Q. Do you recall, Mr. Bergstrom, during the testimony last week, certain exhibits which showed the settlements with six of the roads under the Burlington formula—what is the fact, did those settlements cover the period of eight years, from 1922 to 1929 inclusive?

Mr. Oehler: Immaterial.

The Court: I believe the evidence already shows that such settlements were made. I suppose it is proper to show over what period of time, or what period of time is included. Ob-
[fol. 264] jection overruled. (Plaintiff excepts.)

A. Yes.

Q. And those amounts covered the liability of those roads under the Burlington formula for the entire eight years, is that correct?

Mr. Oehler: Just a minute. I object to that as calling for a conclusion of the witness. The documents talk for themselves—or the stipulated figures in the record.

Mr. Helsell: The objection that the documents are the best evidence is good and unless counsel is willing that the witness should state a conclusion we ask him to produce all of the stipulations, which I will be glad to encumber the record with—

Mr. Oehler: I stipulated the settlements were made with the various roads named and for the amounts there stated. Nothing was said as to the basis, if I remember correctly,

of the computed amount of settlement. I may be wrong about that.

Mr. Helsell: The question is withdrawn for the present. I think I can lay some foundation.

Q. You were the Corporate Examiner who attended the Burlington trial with Mr. Oehler, were you not?

A. I was.

Q. And you have checked the per diem earnings of those roads which were sued for the purpose of determining the [fol. 265] amount of tax due under the Burlington formula for those years?

Mr. Oehler: Just a minute. I object to that as incompetent, irrelevant and immaterial, what disposition was made of those actions or the basis upon which it was made.

The Court: That might be true if I understand it correctly, but if, in fact, they were disposed of upon the actual per diem basis, or liability, rather, on the Burlington formula basis, it may be material. I don't know. Of course, if they were settled upon some other liability or some other basis then of course that wouldn't be material. I don't know. This question, as I recall it, goes to the information as to the basis of the settlement. What was the question again. (Question read.) He may answer. (Plaintiff excepts.)

A. I assisted Mr. Varney do that.

Q. Were the settlements made in amounts equal to the sums due from those roads sued under the "Burlington" formula?

Mr. Oehler: Same objection.

The Court: Overruled. (Plaintiff excepts.)

A. Well, of course, the settlements were made by the Attorney General's office and I had not the complete information as to what all the settlements were, Mr. Helsell.

Q. No, but the question is: For those roads which were sued somebody computed the amount due under the "Burlington" formula, that is true?

[fol. 266] A. Yes, sir.

Q. And the Corporate Examiner did that?

A. Yes, sir.

Q. So far as these settlements made of these suits in Court, those settlements were exactly the amount due from those roads in those years under the "Burlington" formula?

Mr. Oehler: Same objection.

The Court: Overruled. (Plaintiff excepts.)

A. The settlements made in court, you mean?

Q. Yes, sir.

A. Yes, they were.

Q. And the suits covered the liability of those roads for the eight years, 1922 to 1929, is that right?

A. That is right.

Q. Do you know how the matter of per diem is handled in the accounts of private car lines?

Mr. Oehler: Just a minute. I object to that as immaterial. Private car lines, if the Court please, are covered by a separate and distinct statute upon the subject and has no bearing nor is it germane in this case.

The Court: The subject is a novel one to me. I don't quite see the bearing on the—or the bearing it has on the issues here. Are private car lines public utilities?

Mr. Helsell: Yes, sir. They own the cars, the rolling [fol. 267] stock and receive an income from the use of cars on the lines of railroads, a mileage income. The purpose of the question or the inquiry to which this was preliminary is to show that the private car lines in making their returns, in order to avoid double taxation, deduct from their returns the freight car per diem.

Mr. Oehler: They are authorized by statute—the railroads are authorized by, both authorized and directed by statute, if the Court please. Private freight car lines have no bearing on this issue. They are under a separate and distinct statute. I think the rate is different. Here you have a defendant physically operating in the State of Minnesota.

The Court: I am, unfortunately, not familiar with this type of litigation and of course if they come under different statutory provisions that might make any method of determining the tax as to the so-called private car lines wholly inapplicable to the regular line haul railroads. As far as I am informed now, taking the—accepting the statement of counsel for the state as correct, that the two types of service are governed by different statutes, I would think that the question is not material. (Defendant excepts.)

Witness excused.

The Court: I haven't exhibit 25 marked as offered. Has it been. That is the report for 1921.

Mr. Helsell: We offer it, if the Court please.

Mr. Oehler: Same objection as to the others.

[fol. 268]. The Court: Received. (Plaintiff excepts.)

NICHOLAS A. NELSON, a witness heretofore called and duly sworn on behalf of the defendant was recalled and testified as follows:

Direct examination—(Continued).

By Mr. Helsell:

Q. Mr. Nelson, have you now checked defendant's exhibit 21 against your records to determine whether or not the figures shown there correspond with those shown on the reports for those roads for those years?

A. Yes, sir.

Q. What is the fact?

A. They are exactly in accordance with the reports, in every instance.

Mr. Helsell: Defendant offers in evidence defendant's exhibit 21.

Mr. Oehler: The state objects to the offer of the exhibit at this time on the ground it is incompetent, irrelevant and immaterial, first, that to date there has been no showing as to its materiality insofar as the basis or formula under which the various amounts here were or were not computed. It is entirely foreign to the issues in this matter. It purports to show certain reports by certain railroads as to per diem returns, but does not disclose the basis upon which the returns were made. For ought that may appear, the returns there made may be made entirely upon a mileage basis [fol. 269] rather than upon a per diem basis and they may reflect actual figures insofar as they pertain to the State of Minnesota rather than those that may have been computed under any formula. And the formula is not designated or in evidence.

Mr. Helsell: I think, if the Court please, we can show under what formula those reports were made. Of course, we can't do that by this witness.

Mr. Oehler: I make counsel's statement a further ground for exclusion.

The Court: If I understand or recall the evidence correctly then, defendant's exhibit 21 is a re-statement or summary of the contents of reports made by the railroads to the Minnesota Tax Commission and that those roads against which there are figures, the figures indicate the credit balances upon which a gross earnings tax for freight car rentals was calculated. Is that correct, so far?

Mr. Oehler: May I add just one thing. And appearing in response to item number 22 upon the return, reading as follows: "A. Credit Balance, Freight Cars in Transportation Service."

The Court: That is the item in defendant's Exhibit 2.

Mr. Oehler: It appears right here, if the Court please, item 22.

The Court: The same thing as in defendant's exhibit 2.

Mr. Oehler: Yes, that is correct, same description upon the return.

[fol. 270] The Court: That is my understanding. Now, with reference to the question of whether the liability based on these earnings was figured on the "Burlington" formula or not, I am not clear what the evidence shows: I don't recall.

Mr. Helsell: Presumably, since the state has adopted the "Burlington" formula upon the settlement of these suits in May, 1935, all reports are made in accordance with that formula which the state has apparently adopted and which the Supreme Court, in any event, says is implicit in the statute.

Mr. Oehler: You haven't abided by it. Why should we assume other roads have?

Mr. Helsell: We will assume the other roads are more inclined to accept the decision.

Mr. Oehler: I submit the premise is unwarranted. Insofar as this record is concerned, the record clearly substantiates the state's position.

The Court: I think I will overrule the objection and admit the exhibit for whatever it may be worth at this time. (Plaintiff excepts.)

Witness excused.

A. E. L. GAREISS, called as a witness on behalf of the defendant and after being duly sworn testified as follows:

Direct examination.

By Mr. Helsell:

Q: Where do you live?

A. Chicago, Illinois.

[fol. 271] Q. What is your occupation?

A. Statistician for the Illinois Central Railroad Company.

Q. How long have you been engaged in that work?

A. About fifteen years.

Q. Have you made an examination of the freight car per diem credits in the accounts of the Illinois Central Railroad Company for the years 1922 to 1929?

A. I have.

Q. I call your attention to defendant's exhibit number 26 and ask you to state what that is, if you know?

A. That shows the hire of car credit balance for each of the years 1922 to 1929 and the Minnesota per cent of road mileage to the entire line, the Minnesota proportion of hire freight car credit balance with roads operating in Minnesota and the tax at five per cent on that amount—on those amounts.

Q. Are those computations correct?

A. They are.

The Court: I am afraid I haven't been able to follow this witness' explanation of what these figures show. I think you will have to simplify it a little for me.

Q. Briefly, Mr. Gareiss, this exhibit number 26 is simply a compilation of the application of the formula which the [fol. 272] defendant has pleaded by amendment to its answer to the Illinois Central figures for these years?

A. That is correct.

The Court: If I understand it then, the amounts or balances shown on Exhibit 26 are based upon the percentage of the credit balances for freight car hire to the Illinois Central, as arrived at by taking the percentage of the Illinois Central's trackage, miles of trackage in Minnesota, to the total of the miles of trackage of the Illinois Central system.

A. That is correct. When you say "Illinois Central system", I would say Illinois Central Railroad Company.

The Court: How do you arrive at different per cents, then? Are there different numbers of miles in the State in different years?

A. No, different miles in the entire line. The State's mileage I don't believe has changed.

Q. The mileage in the State was thirty and a fraction, is that right, plus six miles of trackage rights over the Rock Island?

A. I believe the total miles was approximately 36.94 miles, as I recall.

Q. That included six miles of trackage rights over the Rock Island?

A. That is correct.

Mr. Helsell: Defendant offers in evidence Exhibit 26.

[fol. 273] Mr. Oehler: If the Court please, the State objects to the exhibit number 26 upon various grounds, among them being that the proposed formula here submitted is not in accordance with the formula, in my opinion, definitely set forth and prescribed by the Supreme Court at least in this respect; that this formula is not computed upon the loaded revenue car miles of the using line even, this formula is not computed upon the trackage of the using line in the State of Minnesota. It is a deviation in that the Court, in the opinion, states and reiterates from time to time that the only proper measure or basis is the use of the cars within the State.

The Court: In overruling your objection and admitting the exhibit the Court, of course I presume it is understood, is not passing on the validity of your objection or its validity in arriving at the final conclusions to be drawn from the evidence, but upon the theory of the case, as the Court understands it, which is to give to the defendants an opportunity to prove that some other formula will be more equitable and will not violate the constitutional rights of the defendant. The exhibit is admitted. (Plaintiff excepts.)

Q. Your attention is called to defendant's Exhibit 21. Was that prepared by you?

A. It was.

Q. Where did you get this list of railroads in the State?

A. I had that list of railroads made up previously for [fol. 274] the years 1922 to 1929. We had it in the office. I don't know where it was first obtained.

Q. Did you examine the records in the office of the Tax Commission to determine what roads had reported freight car per diem earnings for those years?

A. I have.

Q. And does the exhibit show the only roads which reported freight car per diem earnings?

A. That is correct.

Q. Are you able to tell the Court whether or not those reports were made under the "Burlington" formula, or which of them were so made?

Mr. Oehler: May I cross examine the witness as to his qualifications in that regard?

The Court: Yes.

By Mr. Oehler:

Q. Did you personally check back and ascertain whether or not those returns were made under the "Burlington" formula, or some other formula?

A. Were they—

By Mr. Oehler:

Q. I am asking you if you personally, did. Answer that "yes" or "no".

A. Yes.

Q. Where did you do the checking?

A. At the office of the Tax Commission.

By Mr. Oehler:

Q. And when?

[fol. 275] A. I believe it was last Thursday.

By Mr. Oehler:

Q. And are you ready to state the only source of your information was the information set forth on the returns?

A. In some cases there was a supplemental report showing the—how the information was arrived at.

By Mr. Oehler:

Q. And that was attached to the report filed by the reporting railroad company?

A. That is correct.

By Mr. Oehler:

Q. Was that true in all instances?

A. No, it was not; some roads did not show that.

By Mr. Oehler:

Q. Are you in a position to say those roads which made reports for hire of equipment, how many computed it under the "Burlington" formula?

A. No, I couldn't say as to that.

Mr. Helsell continuing:

Q. Will you answer the question and tell the Court which roads reported under the Burlington formula?

Mr. Oehler: I object to that. The tax returns speak for themselves. This is not the best evidence. He is only trying to summarize the statements of comments made upon the returns. I am willing to have the returns talk for themselves.

The Court: Of course, if you object that this is not the best evidence I presume that is well taken. Then Exhibit [fol. 276] 21 would not have been properly admitted in evidence. But you made no such objection to that. In that event, the only proper evidence would be the original reports themselves.

Mr. Oehler: I won't object on that ground; if he will indicate the roads from which it definitely appeared that the returns were made under the "Burlington" formula I have no objection, subject to its materiality, relevancy and competency.

A. The roads reporting under the "Burlington" formula are indicated by "B. F." on the face of the statement.

Q. (By Mr. Oehler): How many roads are there there?

A. Five roads.

Q. (By Mr. Oehler): And how many roads made other returns?

Mr. Helsell: Is this cross examination?

Mr. Oehler: I am just testing his qualifications. All right, I will withdraw it. I won't say a word.

Mr. Helsell: You are at perfect liberty to examine him.

The Court: Go ahead. I understand the question is withdrawn. Proceed. I would like to ask a question here.

I have the impression that the evidence earlier in the case was to the effect that since 1935 the tax on freight car earnings was being calculated by the Minnesota Tax Commission on the "Burlington" formula. If I am wrong in that [fol. 277] impression as to the purport of the evidence I want to be corrected.

Mr. Oehler: I think nothing was said about that. I think that information came from Mr. Bergstrom and he did not know whether the roads were or were not making returns under the "Burlington" formula until he had examined them, once every two years, I think Mr. Bergstrom stated he had not made any investigation of any road that would not be subject to the "Burlington" formula at this time. I may be wrong about that but that is my understanding.

The Court: Perhaps I am wrong, but I got the impression, while no one was willing to say that the Commission had formally adopted the "Burlington" formula by any formal motion that nevertheless that was the basis of its present method of ascertaining the tax.

Mr. Oehler: They don't really ascertain the tax. The roads may or may not make their returns in accordance with the "Burlington" formula, or any other formula, and unless the returns are accompanied by some explanatory remarks, as was done in several instances, or until the roads are examined by the Corporate Examiner, nobody definitely knows whether they are or are not making their returns in accordance with the "Burlington" or any other formula.

The Court: I presume that may be correct, that they may make their return for some specified year on an incorrect basis or on an erroneous theory, or they may omit certain portions of the earnings upon some theory of law or fact. [fol. 278] But what I have in mind is, that at the present time the State is using the "Burlington" formula as the basis for determining the correctness of the return and the amount of the tax.

Mr. Oehler: That is correct, Your Honor.

The Court: And has been since 1935.

Mr. Oehler: The State has advocated the application of the "Burlington" formula. Whether that has been uniformly applied on returns made in connection with it the State isn't in a position to state. But they have definitely advocated the application of the "Burlington" formula and the record may so show.

The Court: Very well.

Mr. Helsell: That, perhaps, is in the nature—I don't know whether it is an admission or a claim in that connection. I would like to have the State say whether or not it has issued any written instructions on its reports for the adoption or following of the "Burlington" formula.

Mr. Oehler: The State declines to make any further comment in the premises.

The Court: It is the Court's understanding that since 1935 it is the policy of the Minnesota Tax Commission to determine liability and to calculate the amount of the tax of all railroads to which the gross earnings tax applies on freight earnings—freight car earnings—on the "Burlington" formula.

Mr. Oehler: And the State subscribes to that statement. [fol. 279] The Court: The result of that, of course, would be that, while any railroad may make a return which does not conform to the formula, the State would claim the right to demand that it be either corrected or would claim the right to, eventually, to assess the tax upon the basis of the application of the formula.

Mr. Helsell: I would like to get our position in the record on that point. It is this, that, although the State may advocate, as the Assistant Attorney General said, the Burlington formula, the statute requires the Public Examiner, now Comptroller, with the approval of the Tax Commission, to adopt a system of gross earnings accounts for the making of returns of earnings of this character. And while it may be that the Attorney General speaks for the State and what it advocates, and the Court may be correct in its understanding that the Commission proposes to adopt and follow the "Burlington" formula, no amount of questioning on our part so far has been able to elicit any information which shows that the Tax Commission or the Comptroller has adopted that formula.

The Court: It is my understanding that the evidence shows that since 1935 the Minnesota Tax Commission has been using the "Burlington" formula as the method of determining the balances upon which the tax shall be calculated. Although the evidence also shows that no formal motion was ever adopted at a stated meeting of the Commission.

Q. Mr. Gariess, when you said that the roads which had followed the "Burlington" formula in making their reports

for the years 1935 and 1936 are shown by the letters "B. L." [fol. 280] on this sheet, you mean on Exhibit 21?

A. That is "B. F." I said. That is Exhibit 21.

Q. Did I say "B. L."? "B. F." I meant.

A. It should be "B. F."

Witness excused.

Mr. Helsell: The defendant rests.

Mr. Oehler: The State rests.

The Court: The Court will enter a forty day stay at the time it files its findings of fact and conclusions of law. As I understand it, it is agreed that in lieu of the reports of the Railroad & Warehouse Commission, copies of the pages put in evidence may be submitted to the Court.

Mr. Oehler: And a copy submitted to me.

The Court: Yes. It may be understood that the defendant will have a copy of the original stipulation on file in the Clerk's office here made for the purposes of substituting for Exhibit 21.

Mr. Oehler: And send me a copy of it because I think he lost mine. That is file 212086.

Mr. Helsell: What is that, the Burlington?

Mr. Oehler: That is right.

Hearing closed.

IN DISTRICT COURT OF RAMSEY COUNTY

MEMORANDUM

The above entitled matter came on for hearing before [fol. 281] the undersigned, one of the judges of this Court, without a jury, at a general term of this Court held in the Court House in Ramsey County, Minnesota, on January 13th, 1938, and subsequent days. The case has been tried once before in the District Court of Ramsey County and appealed to the Supreme Court. State vs. Illinois Central R. R. Co., (Sept. 10, 1937) 274 N. W. 828. A re-hearing was denied by the Supreme Court. State vs. Illinois Central R. R. Co., (October 22, 1937) 275 N. W. 854.

The Supreme Court remanded the case for a limited new trial, as indicated in the following quotations from its opinions:

"The defendant should have opportunity by evidence and argument in the trial court to present its own figures and contentions concerning the application to it of the Burlington formula." "All the data for its use are in the record now by way of evidence except possibly those showing the Minnesota percentage of the using line's mileage. Those figures except for defendant itself were not presented by evidence." "To the extent indicated and to that extent only there must be a new trial." "The only objective of the new trial . . . is to determine the correct amount (of the tax)." "Defendant will have full opportunity to present that argument below and make such record as may be necessary to insure its proper consideration" (any defenses on constitutional grounds). "The main point remains that the amount due will be determined on the so-called Burlington formula unless a better one appears."

On the present trial the defendant was permitted to amend its answer to allege that the Burlington formula "is violative of defendant's constitutional rights" in a number [fol. 282] of named respects and also to allege that:

"A better formula than the so-called 'Burlington' formula is the following: Compute the credit or debit balance on freight equipment interchanged with all other railroads operating in Minnesota, said balance being obtained by striking a system balance with each road, offsetting the sum of debits against the sum of the credits. The resulting credit balance, if any, should be apportioned to Minnesota for taxation on the basis of the reporting company's percentage of track mileage in the state as compared with its total system track mileage."

The state offered no additional evidence at the trial, maintaining that the record now contained all the evidence necessary for the application of the Burlington formula to the defendant's freight car per diem rentals for 1922 to 1929, inclusive, and for the ascertainment of the tax due the state. Counsel for the defendant, as the Court understands it, did not dispute this claim. The defendant offered evidence presumably directed to proving that the Burlington formula worked inequitably and resulted in a violation of the defendant's constitutional rights and that the track mileage per cent set up in the amended answer was a fair, equitable and constitutional method of arriving at the tax.

The Supreme Court appears to have had the impression that the record before it failed to disclose the Minnesota per cent of the using line's freight car miles. These per cents appeared in the application of the Burlington formula on the state's motion for amended findings or a new trial, made before Judge Michael. The figures there shown [fol. 283] were taken from defendant's Exhibit "1", a part of the record in this case. So far as the state is concerned, no further evidence was necessary for the application of the Burlington formula to the omitted freight car rentals to ascertain the Minnesota proportion in determining the tax. Since the state maintained that the Burlington formula was a proper formula for the purpose for which it was being used, it was not necessary for it to present further evidence.

The Court is of the opinion that the evidence presented by the defendant fails to support its contentions either that the track mileage formula is a better formula than the Burlington formula, or that the application of the Burlington formula violates its constitutional rights.

The Supreme Court, in discussing the claim of the defendant made in the Supreme Court that the proper method of apportioning defendant's system credit balances for freight car per diem earnings to Minnesota is to apportion them on the basis of the ratio of its revenue or loaded freight car miles in Minnesota to its system revenue or loaded freight car miles, held:

"The application, for present purposes, of that percentage to its own net system credit balances is indefensible for the simple reason that it helps not at all in ascertaining the amount of car rentals earned by defendant's cars in use by other roads in Minnesota. Plainly, for that purpose, the factor of allocation must be the extent of the use of the cars in Minnesota. The reporting or owning road's Minnesota proportion of its whole mileage is, in consequence, irrelevant; and the Minnesota proportion of the using road's determinative. Because the so-called defendant's formula [fol. 284] used the former erroneous ratio (that of the reporting road) it was properly rejected below."

The objections voiced by the Supreme Court to the use of the reporting road's percentage of revenue freight car miles applies with equal force to the use of the reporting road's track miles in Minnesota. It thus appears that the track mileage formula so advanced by the defendant

at this trial as a substitute for the Burlington formula must be rejected upon the opinion of the Supreme Court. It may be that a track mileage formula based upon the track mileage of the using road might be as fair or more fair than the revenue freight mileage in the Burlington formula. However, the defendant does not urge it. No figures were introduced into the record to indicate its workings and, in view of the defendant's argument that formulating a formula is not a judicial function, it cannot complain if the Court does not exercise its ingenuity to attempt to achieve something better than the Burlington formula.

The second issue involves the constitutional questions raised by the defendant. As the court understands the record, the character of system freight car per diem balances as income and their availability as an item of gross earnings in measuring the tax is not a constitutional question and is not left open in this case. It is not an issue on this limited trial. Here such balances are conclusively presumed income. It follows that any interpretation of the gross earnings tax law which omitted freight car per diem balances in its calculations would result in a tax which violated the constitutional uniformity and equality requirements. If freight car per diem balances were omitted altogether, then a railroad having no such balance in its favor would have its tax measured by its entire income while a railroad whose freight car per diem balance amounted to one-third or one-half or three-fourths of its gross income would have its tax measured by two-thirds or one-half or one-fourth of its gross income. Having assumed that the balance is an "earning", it must be included in computing the tax to avoid discrimination.

It appears to be conceded that the only way the Minnesota proportion of the balance can be determined is by the application of a formula. There is no suggestion in the record that a formula can be framed not on a mileage basis. The two mileage bases proposed are loaded car miles and track miles. (Trial Brief, p. 89) The Burlington formula uses car miles. Defendant's proposed formula uses track miles. There is the further choice of the using road's mileage or the reporting road's mileage. As already indicated the use of the reporting road's mileage, car or track, is irrelevant. Whether the use of the using road's car miles, in place of its track miles, produces a result as favorable to the taxpayer as would be produced by the use of the

reporting road's car miles instead of its track miles, (See Trial Brief, p. 89) does not appear. Neither does it appear that the use of the using road's track miles would produce results more equitable to the taxpayers.

It appears (Trial Brief, p. 89) that the application of the Burlington formula to the defendant's per diem balance produces an increase of about 50% in its taxes for the years 1922-1929. There is no evidence in the record [fol. 286] to which the attention of the Court has been directed or which it has found from which it may be inferred that the resulting total tax for these years is so unrelated to an ad valorem tax as to destroy its character as a lien tax.

It is argued that the Burlington formula produces an un-uniform and unequal tax. If it were possible to offset loaded car mile debits and credits, applicable actually and exclusively to Minnesota, there would be no need for a formula. Would it then be a tenable argument to say the tax lacks uniformity and equality because some roads would show a balance and others would not? It seems a fair inference that under such book-keeping methods, if they were practicable, the roads with the least track mileage would show the least car mileage debits and hence the largest car mileage credits and balances. The nature of such "earnings" is that the credit balance is likely to mount, relatively, as the track miles decrease. Once it is granted that such balances are "earnings", then the fact that they decrease as the track miles increase and disappear entirely when the track mileage in the state reaches 13% to 15% of the system track mileage, is irrelevant. Since balances are "earnings" as a matter of law on this hearing, it is not a subject for complaint that the use of the Burlington formula results in some roads having no such "earnings" in this state, especially in view of the fact that by accurate book-keeping methods of state car miles credits and debits of the reporting road or by a formula employing the using road's track miles, comparable results would be produced. [fol. 287] It would seem that there is, therefore, no tenable ground to hold the tax computed on gross earnings, including freight car rental balances apportioned to Minnesota on the Burlington formula, void as un-uniform or unequal. It is argued that because the earnings through per diem balances (and, therefore, the tax computed on such balances) decrease as the track mileage of a road increases,

the gross earnings tax is demonstrably unrelated to an ad valorem tax. (Trial Brief, pps. 79-80). The reasoning is not persuasive. It is impossible to frame a tax law or a property valuing formula which may not work to the advantage of some and to the disadvantage of others. Further, the reason balances diminish is that more revenue freight car mileage passes over the tracks of the using road as its track mileage in the state increases. This means more earnings from freight transportation. The actual tax may, for all the record shows, be proportionately increased as the track mileage increases. Thus Item 1, Freight Revenue, 7, Passenger Revenue, 15, Mail Revenue, and 16, Express Revenue, to specify only four items of revenue would all increase with increased track mileage. Since the tax on the aggregate of these four items is almost double the tax on per diem balances under the Burlington formula (the aggregate of the other first 21 items being negligible) as applied to the defendant, it would seem fair to infer that as the per diem balance decreases, other revenue increases doubly. But whatever may be the proportionate increase in other revenue, the record does not sustain any inference that the resulting tax is not related reasonably to an ad [fol. 288] valorem tax or results in a tax discriminatory as to the defendant.

There remains the request of the Attorney General that the court find that the defendant must pay interest and penalties in addition to the computed tax. Interest is payable only as a contractual or statutory obligation. County vs. M. & St. P. Land Co., 40 Minn. 512; State vs. New England F. & C. Co., 107 Minn. 52. Obviously there is no contract to pay taxes. There is no statutory provision for interest on a railroad gross earnings tax or tax liability. G. S. 1923, §§ 2233-2260. Hence neither the tax liability nor the tax itself after levy, demand or default bears interest. By its terms S. L. 1907, Ch. 82 (G. S. 1923 §§ 2200-2203) does not apply. It follows that the court cannot make an award of interest. The result is the same whether this proceeding is brought pursuant to the authority in G. S. 1923 § 2240 or § 2249. Under G. S. 1923, § 9477, the clerk of courts in entering judgment will tax interest as an item of costs and disbursements. After judgment interest is payable under G. S. 1923, § 7036.

By G. S. 1923, §§ 2235, 2237 and 2240, the gross earnings statutes prescribe what shall constitute a default, what

penalties follow a default and what administrative remedial steps shall be taken after a default. Whatever may be the rule elsewhere (see Annotation in 96 A. L. R. 925), in this state a taxpayer is not in default if his property is not assessed for taxes without fault on his part, *County vs. M. & St. P. Land Co.*, 40 Minn. 512, or where the tax levied is excessive, *State vs. Great No. Ry. Co.*, 160 Minn. 515; *State vs. Hughes Bros. Timber Co.*, 163 Minn. 4. There [fol. 289] is and can be no claim that the failure to report the freight car per diem earnings for the years 1922 to 1929 inclusive according to the Burlington formula was due to the neglect or default of the defendant. The tax on the freight car earnings demanded by the Minnesota Tax Commission prior to May, 1933, was paid. At all times since May, 1933, the amount demanded has been excessive. The tax computed upon freight car per diem earnings ascertained according to the Burlington formula, unaugmented by unauthorized interest or penalties, has never been certified or otherwise demanded. Hence there never has been a default and no penalties can be imposed or authorized by the court herein. In the case of *State vs. Chicago, R. I. & P. Ry. Co.*, 181 Minn. 615 (623), there was a default in that the taxpayer had failed to make a return of taxable earnings and refused to pay the lawful tax on such omitted earnings.

The Attorney General may submit findings of fact, conclusions of law and order for judgment conforming to the views herein expressed, embodying this memorandum by reference and providing for a stay of forty days.

Gustavus Loevinger, Judge of the District Court.

Dated this 16th day of February, 1938.

IN DISTRICT COURT OF RAMSEY COUNTY

Findings of Fact and Conclusions of Law

The above entitled matter came on for hearing before the undersigned, one of the judges of this Court, without [fol. 290] a jury, at a general term of this Court held in the Court House in Ramsey County, Minnesota, on January 13th, 1938, and subsequent days. The case has been tried once before in the District Court of Ramsey County and

appealed to the Supreme Court. *State vs. Illinois Central R. R. Co.*, (Sept. 10, 1937) 274 N. W. 828. A rehearing was denied by the Supreme Court. *State vs. Illinois Central R. R. Co.*, (October 22, 1937) 275 N. W. 854.

William S. Ervin, Attorney General and Harry W. Oehler, Assistant Attorney General, 102 State Capitol, appeared as attorneys for plaintiff, and Doherty, Rumble, Butler, Sullivan and Mitchell, First National Bank Building, St. Paul, Minnesota, and R. C. Beckett and Chas. A. Helsell, 135 E. 11th Place, Chicago, Illinois, appeared as attorneys for defendant, with V. W. Foster and E. C. Craig, of counsel for defendant.

The Supreme Court remanded the case for a limited new trial, as indicated in the following quotations from its opinions:

"The defendant should have opportunity by evidence and argument in the trial court to present its own figures and contentions concerning the application to it of the Burlington formula." "All the data for its use are in the record now by way of evidence except possibly those showing the Minnesota percentage of the using line's mileage. Those figures except for defendant itself were not presented by evidence." "To the extent indicated and to that extent only there must be a new trial." "The only objective of the new trial . . . is to determine the correct amount (of the tax)." "Defendant will have full opportunity to present [fol. 291] that argument below and make such record as may be necessary to insure its proper consideration" (any defenses on constitutional grounds). "The main point remains that the amount due will be determined on the so-called Burlington formula unless a better one appears."

On the present trial the defendant was permitted to amend its answer to allege that the Burlington formula "is violative of defendant's constitutional rights" in a number of named respects and also to allege that:

"A better formula than the so-called 'Burlington' formula is the following: Compute the credit or debit balance on freight equipment interchanged with all other railroads operating in Minnesota, said balance being obtained by striking a system balance with each road, off-setting the sum of debits against the sum of the credits. The resulting credit balance, if any, should be apportioned to Min-

nesota for taxation on the basis of the reporting company's percentage of track mileage in the state as compared with its total system track mileage."

The state offered no additional evidence at the trial maintaining that the record now contained all the evidence necessary for the application of the Burlington formula to the defendant's freight car per diem rentals for 1922 to 1929, inclusive, and for the ascertainment of the tax due the state. Counsel for the defendant, as the Court understands it, did not dispute this claim. The defendant offered evidence presumably directed to proving that the Burlington formula worked inequitably and resulted in a violation of the defendant's constitutional rights and that the track mileage per [fol. 292] cent set up in the amended answer was a fair, equitable and constitutional method of arriving at the tax.

The Supreme Court appears to have had the impression that the record before it failed to disclose the Minnesota per cent of the using line's freight car miles. These per cents appeared in the application of the Burlington formula on the state's motion for amended findings or a new trial, made before Judge Michael. The figures there shown were taken from defendant's exhibit "1", a part of the record in this case. So far as the state is concerned, no further evidence was necessary for the application of the Burlington formula to the omitted freight car rentals to ascertain the Minnesota proportion in determining the tax. Since the state maintained that the Burlington formula was a proper formula for the purpose for which it was being used, it was not necessary for it to present further evidence.

Upon all the files, records and proceedings heretofore had herein, including the remittitur, the Court makes the following

FINDINGS OF FACT

1.

That the application of the Burlington formula does not violate the constitutional rights of the defendant.

2.

That the track mileage formula, offered by the defendant, is not a better formula than the Burlington formula.

[fol. 293]

3.

That under the Burlington formula there became due and owing the plaintiff from the defendant \$26,414.59, and all as indicated under the following captions and figures, namely:

Summary

Year	Minnesota Proportion of Credit Balances	Minnesota Proportion of Debit Balances	Net Credit Balance	Tax @ 5%
1922.....	\$95,359.49	\$237.43	\$95,122.06	\$4,756.10
1923.....	91,413.54	197.55	91,215.99	4,560.80
1924.....	89,432.09	350.27	89,081.82	4,454.09
1925.....	56,146.19	158.21	55,987.98	2,799.40
1926.....	30,544.42	197.18	30,347.24	1,517.36
1927.....	60,132.80	83.89	60,048.91	3,002.45
1928.....	57,496.76	100.97	57,394.79	2,869.74
1929.....	49,184.12	91.18	49,092.94	2,454.65
	<u>\$529,708.41</u>	<u>\$1,416.68</u>	<u>\$528,291.73</u>	<u>\$26,414.59</u>

4.

That that part of the gross earnings of the defendant, reflected in the net credit balances above set forth, were not included in defendant's semi-annual returns and reports made to the Minnesota Tax Commission of its gross earnings required to be made on February 15th and August 15th of each year above set forth, and the same were items of gross earnings not reported.

5.

That the Burlington formula was not formally suggested in this particular action until after the first trial and was then suggested in plaintiff's motion for amended findings or a new trial (November 21, 1935), and the failure to report the freight car per diem earnings for the years 1922 to 1929 inclusive, according to the Burlington formula, was not due to the neglect or default of defendant.

[fol. 294]

6

That the written memorandum of the Court herein, dated February 16, 1938, is hereby referred to and made a part hereof.

Based upon the foregoing Findings of Fact, the Court now makes the following

Conclusions of Law:

That the State of Minnesota is entitled to recover from the defendant the sum of \$26,414.59, with interest thereon at the rate of 6 per cent per annum from and after the filing of these findings, together with its costs and disbursements herein.

Gustavus Loevinger, Judge of the District Court.

Dated March 3rd, 1938.

Stay of 40 days is granted.

Loevinger, J.

IN DISTRICT COURT OF RAMSEY COUNTY

DEFENDANT'S ALTERNATIVE MOTION FOR AMENDED FINDINGS OR FOR NEW TRIAL

To William S. Ervin, Attorney General, Harry W. Oehler, Assistant Attorney General, 102 State Capitol, St. Paul, Minnesota, Attorney for Plaintiff.

Take Notice, that upon all the files, exhibits, records and proceedings of every kind and nature heretofore had herein, [fol. 295] and upon the minutes of the court taken at the last trial of the above entitled action, the plaintiff will move the court, at a special term thereof, to be held in the Court House in the City of St. Paul, Ramsey County, Minnesota, on the 19th day of March, 1938, 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order amending the findings of fact and conclusions made and filed herein on March 3, 1938, in the following particulars:

I

Paragraph 1: By striking all thereof.

II

Paragraph 2: By striking all thereof.

III

Paragraph 3: By striking all thereof.

IV

Paragraph 4: By striking all thereof.

V

Conclusions of Law: By striking all thereof.

VI

By substituting for the Findings of Fact and Conclusions of Law filed by the court on the 3rd day of March, 1938 (except the 5th finding of fact to which no objection is made), the following:

1. The court finds that the so-called Burlington formula was not pleaded in the original complaint, has not been pleaded in any amendment thereto, is not ascertainable from the text of the statute, and has never been adopted [fol. 296] by the Comptroller with the approval of the Tax Commission, as required by the statute (Sec. 2239, Mason's Rev. Stats. 1927).

2. That the Illinois Central Railroad Company paid the full amount of its gross earnings taxes arising out of freight car per diem earnings, as computed in exact compliance with the State's formula, prescribed by the Comptroller, (then Public Examiner) approved by the Tax Commission, (as required by Sec. 2239 of the statutes) and furnished to the railroads by the Tax Commission on printed forms prepared by it and issued to all reporting railroads.

3. In compliance with Sec. 3282, Mason's Rev. Stats. 1927, the Comptroller of the State of Minnesota caused defendant's books to be audited for the purpose of ascertaining the amount of freight car per diem earnings, found a balance due of \$160.58 for the years in question, 1922-1929, certified such amount to the State Auditor, who in turn certified the amount to the State Treasurer, which amount was paid in full by the defendant and the receipt of its State Treasurer taken.

4. That the formula suggested by defendant in the amendment to its answer, i.e.:

"Compute the credit or debit balance on freight equipment interchanged with all other railroads operating in Minnesota, said balance being obtained by striking a system balance with each road, off-setting the sum of debits against the sum of the credits. The resulting credit balance, if any, should be apportioned to Minnesota for taxation on the basis of the reporting company's percentage of track mileage in the state as compared with its total system track mileage."

[fol. 297] is a better formula than the so-called Burlington formula, is consistent with the Minnesota statute, and most nearly produces a tax proportionate to the relative amount of railroad earnings and property in Minnesota.

5. That loaded freight car miles, attempted to be used by the State of Minnesota, is not a proper factor nor a proper basis for determining the amount of freight car per diem earnings. That time is the sole proper basis for computing such earnings. The loaded freight car mile basis ignores the undisputed fact that per diem accrues on empty cars, as well as loaded cars, and that there is a large and constantly varying percentage of empty car mileage.

6. The Illinois Central Railroad Company does not own or operate a road in the State of Minnesota; that under the terms of the contract between the Illinois Central Railroad Company and the Dubuque and Sioux City Railroad Company (which are not contraverted) all of the earnings go to, and are the property of the Dubuque and Sioux City Railroad Company.

7. The court finds that the Burlington formula would produce a burden on interstate commerce in that too great a percentage of defendant's system earnings are allocated to the State of Minnesota because:

(a) The Illinois Central has no earnings whatever in the State of Minnesota since under the terms of the lease they are the property of the Dubuque and Sioux City Railroad Company;

[fol. 298] (b) A far greater percentage of defendant's interstate earnings are allocated to Minnesota than is proportionate to the relative amount of system property there.

8. That the Burlington formula produces a tax not uniform on the same classes of property, in violation of Section 1 of Article IX of the Minnesota Constitution requiring taxes to be uniform, in that many railroad companies with far more property in Minnesota than defendant has, are not taxed in any amount whatever on their freight car per diem earnings.

9. That the Burlington formula would take defendant's property in violation of Section 11 of Article I of the Minnesota Constitution, since to apply it for the years

1922-1929, inclusive, would give it a retroactive effect, in contravention of such provision of the Minnesota Constitution. And it would violate defendant's vested rights arising from payment of the full tax computed in exact accord with the formula prescribed by the State of Minnesota, under specific legislative authority, for these years.

10. That the application of the Burlington formula would take defendant's property without due process of law in that if given a retroactive effect, results in an additional tax after the payment of the amount demanded by the State for the years in question, which would be arbitrary, unreasonable and capricious.

11. That the application of the Burlington formula would take defendant's property without due process of law in violation of the Fourteenth Amendment to the Constitution [fol. 299] of the United States, in that its application would result in an arbitrary, discriminatory, unreasonable and capricious tax (concededly in lieu of all ad valorem taxes) wholly unrelated to the relative amount of defendant's property in the State of Minnesota; and grossly discriminatory in comparison with the tax on other railroads in the state having far greater mileage.

You will Further Take Notice, that in default of the court granting the foregoing motion the plaintiff will, at the same time and place, move the said court to vacate and set aside its said order herein, dated March 3, 1938, and grant a new trial thereof for the reason that the findings of the court herein referred to are not within the issues, not justified by the evidence, and are inconsistent, and the conclusion of law and order for judgment therein are not justified by the findings of fact and are contrary to law.

Doherty, Rumble, Butler, Sullivan & Mitchell, E-1006
1st Natl. Bk. Bldg., St. Paul, Minnesota. R. C.
Beckett, Chas. A. Helsell, 135 E. 11th Place, Chi-
cago, Illinois, Attorneys for Defendant. E. C.
Craig, V. W. Foster, 135 E. 11th Place, Chicago,
Illinois, Of counsel.

[fol. 300] IN DISTRICT COURT OF RAMSEY COUNTY

PLAINTIFF'S ALTERNATIVE MOTION FOR AMENDED FINDINGS OR For New Trial to: Doherty, Rumble, Butler, Sullivan & Mitchell and R. C. Beckett and Chas. A. Helsell (and V. W. Foster and E. C. Craig, of Counsel), E-1006 First National Bank Building, St. Paul, Minnesota, Attorneys for Defendant

Take Notice, that upon all the files, exhibits, records, remitturs and proceedings of every kind and nature heretofore had herein, and upon the minutes of the court taken at the last trial of the above entitled action, the plaintiff will move the court, at a special term thereof, to be held in the Court House in the City of St. Paul, Ramsey County, Minnesota, on March 19, 1938, 10 o'clock a. m., or as soon thereafter as counsel can be heard, for an order amending the findings of fact and conclusions made and filed herein on March 3, 1938, and in the following particulars:

I. Paragraph 5: By striking all thereof.

II. Paragraph 6: By striking all thereof.

III. Conclusions of law: By striking all thereof and substituting therefor the following:

"1. That the State of Minnesota is entitled to recover from the defendant, the sum of the totals hereinafter set [fol. 301] forth, together with interest on said respective totals, from the due dates thereof, until paid, at the rate of 1% per month, namely:

Year	Due Date	Tax	Penalty	Total
1922	3-1-23	\$4,756.10	\$475.61	\$5,231.71
1923	3-1-24	4,560.80	456.08	5,016.88
1924	3-1-25	4,454.09	445.41	4,899.50
1925	3-1-26	2,799.40	279.94	3,079.34
1926	3-1-27	1,517.36	151.74	1,669.10
1927	3-1-28	3,002.45	300.25	3,302.70
1928	3-1-29	2,869.74	286.97	3,156.71
1929	3-1-30	2,454.65	245.47	2,700.12

2. Together with its costs and disbursements herein."

You Will Further Take Notice, that in default of the court granting the foregoing motion the plaintiff will, at the same time and place, move the said court to vacate and set aside its said order herein, dated March 3, 1938, and grant a new trial thereof for the reason that the findings herein

referred to are not within the issues, not justified by the evidence, and are inconsistent, and the conclusions of law and order for judgment therein are contrary to law.

William S. Ervin, Attorney General. Harry W. Oehler, Assistant Attorney General. Attorneys for Plaintiff, 102 State Capitol, St. Paul, Minnesota.

[fol. 302] IN DISTRICT COURT OF RAMSEY COUNTY

ORDER DENYING MOTIONS FOR AMENDED FINDING, ETC.

The above entitled matter came on for hearing before the undersigned, one of the judges of this Court, at a special term held in the Court House in Ramsey County, Minnesota, on March 19, 1938. Plaintiff appeared by Harry Oehler, Assistant Attorney General. The defendant appeared by R. C. Beckett and Charles A. Helsell, its attorneys. The defendant thereupon moved the Court, upon all the files, exhibits, records and proceedings of every kind and nature heretofore had herein, and upon the minutes of the Court taken at the last trial of the above entitled action for an order amending the findings of fact and conclusions of law made and filed herein on March 3, 1938, in the particulars set forth in the notice of motion filed herein on March 18, 1938, and further moved the Court that in default of the granting of the foregoing motion that the Court vacate and set aside its order herein dated March 3, 1938, and granting a new trial for the reason that the findings of the Court herein are not within the issues not justified by the evidence, are inconsistent, and that the conclusions and order for judgment herein are not justified by the findings of fact and are contrary to law.

It is ordered that both of said motions be in all things denied.

Gustavus Loevinger, Judge of the District Court.

Dated this 19th day of March, 1938.

A stay of thirty days is granted.

[fol. 303]

MEMORANDUM:

Insofar as the proposed findings of fact are inconsistent with the findings made, the Court feels that it is not neces-

sary to discuss them beyond what has already been said in the memorandum filed. With reference to the requests for proposed findings two and three, the Court is of the opinion that they are not within the limited issue upon which the trial was conducted pursuant to the mandate of the Supreme Court. Should the facts requested to be found in proposed findings two and three be found material upon an appeal the Court is of the opinion that the defendant, upon the record as made, will have the benefit of them, as it seems to the Court that the whole case is based upon the theory that the defendant did pay according to the printed formula prepared by the Comptroller and the Tax Commission for the years 1922 to 1929, inclusive, but that the Comptroller, the Tax Commission and the defendant were in error in determining the gross earnings insofar as they applied to loaded freight car rentals upon that basis. As the Court understands it, there is, and can be no dispute upon the record as to the factual accuracy of the matters stated in proposed findings numbered two and three.

A question was raised on this hearing by the Court on its own motion as to a credit to which the defendant was entitled by reason of freight car balance credits previously reported and included in the gross earnings tax computations, and that possibly the findings as made and filed by the Court failed to give the defendant such credits. In response to an inquiry by the Court, the Assistant Attorney General [fol. 304] stated that he believed that there was a basis of fact for the Court's suggestion and that on behalf of the state he would stipulate that should the findings of the Court be sustained upon appeal, that an allowance or adjustment would be made to the defendant in the eventual calculation of the amounts due for any sums previously reported and not taken into consideration in the findings as made. Is that correct, Mr. Oehler?

Mr. Oehler: That is correct, Your Honor.

Loevinger, J.

IN DISTRICT COURT OF RAMSEY COUNTY

STIPULATION AS TO RECORD ON APPEAL

It is Stipulated, between plaintiff and defendant, that the printed record in the first appeal in this case to the Supreme Court of Minnesota shall constitute a part of the record

for the purpose of the second appeal to be taken by defendant and shall be supplemented by a record of the proceedings at the second trial before Judge Gustavus Loevinger.

Dated April 7th, 1938.

William S. Ervin, Attorney General. Harry W. Oehler, Deputy Attorney General. Attorneys for Plaintiff. Doherty, Rumble, Butler, Sullivan & Mitchell, Chas. A. Helsell, R. C. Beckett, Attorneys for Defendant.

[fol. 305] IN SUPREME COURT OF MINNESOTA

STATE OF MINNESOTA, Respondent,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a corporation,
Appellant.

ORDER AS TO RECORD ON APPEAL

Pursuant to the stipulation of the parties hereto dated April 7th, 1938, it is hereby

Ordered that the printed record as filed in this Court on the first appeal of this case may be and it hereby shall constitute and be considered by this Court as a part of the record for the purpose of the second appeal now being undertaken by the appellant.

Dated April 13, 1938.

Andrew Holt, Justice of Supreme Court.

IN DISTRICT COURT OF RAMSEY COUNTY

[Title omitted]

STIPULATION FOR THE SETTLEMENT OF CASE

It is Hereby Stipulated, that the case consisting of the "record of proceedings and testimony had on the trial", as corrected, consisting of one hundred forty (140) pages [fols. 306-307] of typewritten matter and the exhibits therein referred to may be taken as conformable to the truth and as containing all the evidence offered or introduced on the trial of this cause, and also all objections, rules, orders and

all other proceedings of such trial, and that the same may be settled and allowed as the settled case herein by the Honorable Gustavus Loevinger without notice.

Dated April 7th, 1938.

William S. Ervin, Attorney General. Harry W. Oehler, Deputy Attorney General. Attorneys for Plaintiff. Doherty, Rumble, Butler, Sullivan & Mitchell, Chas. A. Helsell, R. C. Beckett, Attorneys for Defendant.

IN DISTRICT COURT OF RAMSEY COUNTY

ORDER SETTLING CASE

Upon the foregoing stipulation, I hereby certify that the foregoing case, consisting of the "record of proceedings and testimony had on the trial" and consisting of one hundred forty (140) pages of typewritten matter and exhibits therein referred to, is conformable to the truth and contains all the evidence offered and introduced on the trial of this cause, and all objections, rules and orders and all other [fol. 308] proceedings of such trial, and I hereby settle and allow the same as the settled case herein.

Dated April 8, 1938.

Gustavus Loevinger, District Judge.

IN DISTRICT COURT OF RAMSEY COUNTY

NOTICE OF APPEAL

To the above named Plaintiff, William S. Ervin, Attorney General, Harry W. Oehler, Deputy Attorney General, Attorneys for the plaintiff, and to N. C. Robinson, Esq., Clerk of the above named Court:

You will Please Take Notice, that the above named defendant appeals to the Supreme Court of the State of Minnesota from that certain order of the District Court in this action dated March 19, 1938, denying defendant's alternative motion for an order amending the Court's findings of fact and conclusions of law herein and denying the motion of defendant for a new trial and from the whole thereof.

Dated this 12th day of April, 1938.

Doherty, Rumble, Butler, Sullivan & Mitchell, C. A. Helsell, R. C. Beckett, Attorneys for Defendant.

[fol. 309] IN SUPREME COURT OF MINNESOTA, RAMSEY
COUNTY

32 and 33

[File endorsement omitted]

31791

STATE OF MINNESOTA, Respondent

VS.

ILLINOIS CENTRAL RAILROAD Co., Appellant

31910

STATE OF MINNESOTA, Appellant

VS.

ILLINOIS CENTRAL RAILROAD Co., Respondent

Syllabus

HOLT, J.:

1. Where a railroad has for a long period of years kept accounts of gross earnings and made reports thereon on forms prescribed by the public examiner and approved by the tax commission, and has paid the tax on credit balances from the interchange of freight cars, it is not subject to penalties prescribed by Mason Minn. St. 1927, §2235, for non-payment of such credit balances computed according to a formula first devised during the trial of this action brought for an excessive demand of such omitted credit balances.

2. On a former appeal herein, this court approved the Burlington formula, so-called, for computing the credit balances from the interchange of freight cars between railroads operating within the state, and remitted the case with leave to defendant to prove that a better formula for the computing of such balances existed than the Burlington formula, and also for leave to argue constitutional objections to that formula, in case defendant failed to prove a [fol. 310] better. Defendant failed to prove a better one, and since the Burlington formula furnishes the most ac-

curate computation of such credit balances and such balances are properly gross earnings there can be no constitutional objection to the use of the Burlington formula.

Affirmed.

OPINION—Filed February 17, 1939

HOLT, Justice:

On plaintiff's appeal the judgment in its favor for omitted gross earnings taxes for the years 1922 to 1929 inclusive in the amount of \$12,866.50 was reversed. *State v. Illinois Central Railroad Co.* 200 Minn. 583, 274 N. W. 828, 275 N. W. 854. However, all defenses to a recovery for such omitted taxes were therein determined in favor of plaintiff, and also that the judgment should have been for the sum of \$26,414.59. The case was remitted with direction that defendant be given the opportunity to prove the existence of a better method for ascertaining the correct credit balances for interchange of freight cars than the Burlington formula, and, in case no better one was proven, that defendant could also urge that the application of that formula contravened some provision of the state or federal constitution. The court below, over plaintiff's objection, permitted an amendment of the answer by adding this paragraph: "That a better formula than the so-called 'Burlington Formula', and the only one permitted under a proper construction of the statutes, is that which the state adopted and promulgated for the years in question, i.e. that which requires the striking of a system balance and the allocation to Minnesota for taxation of a percentage thereof equal to the percentage of the reporting company's line in Minnesota." Upon the limited issues the court was directed to try, it made these findings: "1. That the application of the Burlington formula does not violate the constitutional [fol. 311] rights of the defendant. 2. That the track mileage formula offered by the defendant, is not a better formula than the Burlington formula. 3. That under the Burlington formula there became due and owing the plaintiff from the defendant \$26,414.59, [the amount omitted each of the eight years, excluding penalties, is given]. 4. That that part of the gross earnings of the defendant, reflected in the net credit balances above set forth, were not included in defendant's semi-annual returns * * * and

the same were items of gross earnings not reported. 5. That the Burlington formula was not formally suggested in this particular action until after the first trial, and was then suggested in plaintiff's motion for amended findings or a new trial (Nov. 21, 1935), and the failure to report the freight car per diem earnings for the years 1922 to 1929, inclusive, according to the Burlington formula was not due to the neglect or default of defendant." The conclusion of law was that plaintiff recover \$26,414.59, with interest at six per cent from and after the filing of the findings, and costs and disbursements. Each party moved separately for amended findings or a new trial. From the orders denying the motions each party appeals.

Plaintiff's appeal presents only its right to the penalty and interest prescribed in Mason Minn. St. 1927, §2235. The right to penalty and interest under §2240 cannot well arise for the small error or omission discovered by the public examiner was promptly paid. Chapter 487, Laws 1913 as amended by Ch. 308, L. 1927 (§§2233 to 2242, Mason's Minn. St. 1927) and Ch. 9, Ex. Sess. L. 1912 as amended by Ch. 533 L. 1919 (§§2246 to 2250, Mason Minn. St. 1927) cover the law upon which penalties may be claimed. Section 2233 relates to reporting, upon forms prescribed by the tax commission, the gross earnings. Section 2237 provides what shall be done where there is a failure to report or default after notice served. There was no such proceeding during any of these eight years or within a reasonable time thereafter. Plaintiff relies on State v. [fol. 312] Chicago, Rock Island & Pac. Ry. Co. 181 Minn. 615, 233 N. W. 866, where penalties were recovered. In that case, there was a failure to report certain items of gross earnings, and it was held that the penalty and interest attached when the payment fell due and was not made. Since the enactment of §95 Mason, Minn. St. 1927, the railroad companies could tender payment of part of the gross earnings demanded by the state and thus avoid penalties on such part. As we understand, that is not applicable to the instant case, where proper reports were filed, reports from which the tax was computed that was paid, and from which it could be computed as the court computed it in the first trial, and from which it could be computed under the Burlington formula. There was hence no failure to comply with the bookkeeping and accounts which defendant was required to keep under regulations of the tax com-

mission and supervision of the public examiner. The failure to pay the taxes now found owing was because the statute prescribed no formula for computing the tax from the returns made. It had to be computed according to some formula. It was so computed for the time in question to the knowledge of the state agencies having the enforcement of the gross earnings tax in charge, and no one suspected that a better one could be devised until 1933. Such being the case the taxpayer should not be subjected to penalties for failure to pay the credit balances derived from the interchange of freight cars with the different railroads operating some part of their transportation system within the state. That penalties are not imposed unless clearly called for by a violation of some statutory duty in respect to the return or payment of the tax is illustrated in *State v. Great Northern Ry. Co.* 160 Minn. 515, 200 N. W. 834. Although in that case interest accrued on the omitted tax after Ch. 398, §3, L. 1917 (§95 of the code) took effect, the plaintiff could not recover such interest. In this action there were not separable items, but one sum of \$182,751.30 demanded. Only \$26,414.59 was recovered. It would be utterly repugnant to one's sense of justice to penalize defendant when it had paid and the state agencies for each of the eight years in question had accepted certain sums as the credit balances for interchange of cars according to accounts kept and reports made pursuant to statutes. We deem the fifth finding of the court, above quoted, well sustained that the failure to report and pay the credit balances for interchange of cars computed according to the Burlington formula was "not due to the neglect or default of defendant." In the memorandum made part of the findings, the court refers to the fact that there is no statutory liability for interest on a railroad's gross earnings tax, and proceeds thus: "By G. S. 1923, sections 2235, 2237, and 2240, the gross earnings statutes prescribe what shall constitute a default, what penalties follow a default and what administrative remedial steps shall be taken after a default. Whatever may be the rule elsewhere [see annotation in 96 A. L. R. 925], in this state a taxpayer is not in default if his property is not assessed for taxes without fault on his part, *County v. M. P. & St. P. Land Co.* 40 Minn. 512, or where the tax levied is excessive, *State v. Great Northern Ry. Co.* 160 Minn. 515; *State v. Hughes Bros. Timber Co.* 163 Minn. 4. There is and can be no claim

that the failure to report the freight car per diem earnings for the years 1922 to 1929 inclusive according to the Burlington formula was due to the neglect or default of the defendant. The tax on the freight car earnings demanded by the Minnesota Tax Commission prior to May, 1933, was paid. At all times since May, 1933, the amount demanded has been excessive. The tax computed upon freight car per diem earnings ascertained according to the Burlington formula, unaugmented by unauthorized interest or penalties, has never been certified or otherwise demanded. Hence there never has been a default and no penalties can be imposed or authorized by the court herein". Plaintiff's appeal must fail.

[fol. 314] Defendant assails the Burlington formula as repugnant to state and federal constitutional provisions. If computation of defendant's credit balances from the interchange of freight cars with railroads operating in this state according to the said formula or method reaches accuracy more nearly than any other, all constitutional objections to its use vanish. That such credit balances constitute gross earnings of a railroad has been settled law since 1908. *State v. Minnesota & International Ry. Co.*, 106 Minn. 176, 118 N. W. 1007; *State v. Great Northern Ry. Co.*, 163 Minn. 88, 203 N. W. 453.

The defenses held not valid on the first appeal do not raise any constitutional question, as we see it, but merely fact issues. By reference to defendant's briefs on that appeal, and on the rehearing, it appears that it was exhaustively argued that, since for more than twenty years prior to 1933, the credit balances for interchange of freight cars between railroads had been reported on prescribed forms and computed according to a uniform system or formula upon which the tax was paid, plaintiff should be estopped to now claim any omitted gross earnings tax for the years in question. That defense was definitely rejected. So also was the one that there had been an account stated for any omission to report and pay credit balances for the years 1922 to 1929, inclusive, when the public examiner upon auditing the returns for said years found an omission of \$119.13, which he reported to the state auditor, who, pursuant to statute drew a draft therefor on defendant, including \$11.91 penalty and \$29.54 interest, total of \$160.58, which was promptly paid to the state treasurer and his receipt obtained July 20, 1931. The duty and powers of the public examiner

by virtue of §3282, 1 Mason Minn. St. 1927, were emphasized in defendant's said briefs and the contention made that there had been an account stated and paid. It is clear that it was not intended to leave either of these two defenses to be either retried or open to the claim that constitutional provisions required either one to be sustained.

[fol. 315] The decisive finding of fact, on defendant's appeal, is the one "that the track mileage formula, offered by the defendant, is not a better formula than the Burlington formula." As we read defendant's evidence it does not even tend to prove that the formula it was permitted to plead and prove would more accurately reflect the credit balances on interchanged freight cars than the Burlington formula. It only showed that some seven or eight of the railroads operating large trackage within the state had no credit balances under the Burlington formula. But, as shown in the former opinion, the trackage operated by a railroad within the state does not measure the credit balances from car rentals of its system that may be allocated to its gross earnings tax here. Defendant's evidence does not refute but sustains the court's findings to the effect that its proposed formula is not better than the Burlington formula.

The order on plaintiff's appeal is affirmed and likewise is the order on defendant's appeal.

Holt, Justice.

Peterson, J. took no part for reasons given in 200 Minn. 583.

[fol. 316] IN SUPREME COURT OF MINNESOTA

31791

STATE OF MINNESOTA, Respondent,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, Appellant.

JUDGMENT—March 14, 1939

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit,

of the District Court within and for the County Ramsey be and the same hereby is in all things affirmed.

Dated and signed Mar. 14, 1939.

By the Court.

Attest: Grace Kaercher Davis, Clerk.

[fol. 317] IN SUPREME COURT OF MINNESOTA

No. 31910

STATE OF MINNESOTA, Plaintiff-Appellant,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, Defendant-Respondent.

STIPULATION AS TO RECORD—Filed Aug. 25, 1938

Herein it is hereby stipulated and agreed, by and between the parties hereto, through their respective counsel, as follows:

I

That the printed record heretofore served in an appeal pending in this court, similarly entitled, and wherein the respondent herein is appellant and wherein the appellant herein is respondent, being file No. 31791 in this Court, may be used, treated and regarded as the printed record herein, the same to be supplemented by such additional papers, records and documents as the appellant herein deems necessary to present its appeal herein.

[fol. 318]

II

That any order of this Court fixing the time within which the printed record and briefs shall be filed may relate to only such supplemental printed record and briefs.

III

That for the purpose of continuity, the appellant herein may number its record pages as a continuation of the record of the appellant in file No. 31791.

IV

It is agreed that the sole question presented by the State's appeal in this case is that involving the allowance of statutory penalty and interest.

William S. Ervin, Attorney General; Harry W. Oehler, Assistant Attorney General, Attorneys for Appellant. By Harry W. Oehler.

Doherty, Rumble, Butler, Sullivan and Mitchell, R. C. Beckett, Chas. A. Helsell, V. W. Foster, E. C. Craig, Attorneys for Respondents. By Charles A. Helsell.

[fol. 319] IN SUPREME COURT OF MINNESOTA

ORDER AS TO RECORD—Filed Aug. 25, 1938

Upon the attached stipulation, It Is Hereby Ordered:

1. That the printed record heretofore served in an appeal pending in this court, similarly entitled, and wherein the respondent herein is appellant and wherein the appellant herein is respondent, being file No. 31791 in this court, may be used, treated and regarded as the printed record herein, the same to be supplemented by such additional papers, records and documents as the appellant herein deems necessary to present its appeal herein.

2. That the time within which the printed record and briefs herein shall be filed relates only to such supplemental printed records and briefs.

3. That for the purpose of continuity, the appellant herein may number its record pages as a continuation of the record of the appellant in file No. 31791.

4. That, necessarily, the appellant need not serve and file that part of the printed record covered by file No. 31791.

Dated this 25th day of August, 1938.

Andrew Holt, Justice.

[fol. 320] IN DISTRICT COURT OF RAMSEY COUNTY

STATE OF MINNESOTA, Plaintiff,

VS.

ILLINOIS CENTRAL RAILWAY COMPANY, Defendant

PLAINTIFF'S ALTERNATIVE MOTION FOR AMENDED FINDINGS OR
FOR NEW TRIAL—Filed March 10, 1938

To: Doherty, Rumble, Butler, Sullivan & Mitchell and
R. S. Beckett and Chas. A. Helsell (and V. W. Foster and
E. C. Craig, of Counsel), E-1006 First National Bank
Building, St. Paul, Minnesota, Attorneys for Defendant.

Take Notice, that upon all the files, exhibits, records,
remittiturs and proceedings of every kind and nature here-
tofore had herein, and upon the minutes of the court taken
at the last trial of the above entitled action, the plaintiff
will move the court, at a special term thereof, to be held
in the Court House in the City of St. Paul, Ramsey County,
Minnesota, on March 19, 1938, 10 o'clock a. m., or as soon
thereafter as counsel can be heard, for an order amending
the findings of fact and conclusions made and filed herein
on March 3, 1938, and in the following particulars:

[fol. 321] I. Paragraph 5: By striking all thereof.

II. Paragraph 6: By striking all thereof.

III. Conclusions of law: By striking all thereof and
substituting therefor the following:

"1. That the State of Minnesota is entitled to recover
from the defendant, the sum of the totals hereinafter set
forth, together with interest on said respective totals, from
the due dates thereof, until paid, at the rate of 1% per
month, namely:

Year	Due Date	Tax	Penalty	Total
1922	3-1-23	\$4,756.10	\$475.61	\$5,231.71
1923	3-1-24	4,560.80	456.08	5,016.88
1924	8-1-25	4,454.09	445.41	4,899.50
1925	3-1-26	2,799.40	279.94	3,079.34
1926	3-1-27	1,517.36	151.74	1,669.10
1927	3-1-28	3,002.45	300.25	3,302.70
1928	3-1-29	2,869.74	286.97	3,156.71
1929	3-1-30	2,454.65	245.47	2,700.12

2. Together with its costs and disbursements herein."

You Will Further Take Notice, that in default of the court granting the foregoing motion the plaintiff will, at the same time and place, move the said court to vacate and set aside its said order herein, dated March 3, 1938, and grant a new trial thereof for the reason that the findings herein referred to are not within the issues, not justified by the evidence, and are inconsistent, and the conclusions [fol. 322] of law and order for judgment therein are contrary to law.

William S. Ervin, Attorney General, Harry W. Oehler, Assistant Attorney General, Attorneys for Plaintiff, 102 State Capitol, St. Paul, Minnesota.

(Served March 9, 1938 and filed March 10, 1938.)

IN DISTRICT COURT OF RAMSEY COUNTY

ORDER ON MOTION—Filed March 21, 1938

The above entitled matter came on for hearing before the undersigned, one of the judges of this court, at a special term thereof held in the Court House in Ramsey County, Minnesota, March 19, 1938. Plaintiff appeared by Harry Oehler, Assistant Attorney General. Defendant appeared by R. C. Beckett and Charles A. Helsell, its attorneys. The plaintiff thereupon moved the court, upon all the files, exhibits, records, remittiturs and proceedings of every kind and nature heretofore had herein, and upon the minutes of the court taken at the last trial of the above entitled action, for an order amending the findings of fact and conclusions of law made and filed herein on March 3, 1938, in the particulars stated in the notice of motion filed herein on March 10, 1938; and further moved the Court that in [fol. 323] default of the Court granting the foregoing motion, the Court vacate and set aside its said order herein dated March 3, 1938, and grant a new trial herein for the reason that the findings of fact and conclusions of law as made by the Court are not within the issues, not justified by the evidence, are inconsistent, and the conclusions of law and order for judgment herein are contrary to law.

It is ordered that said motions be in all things denied.

Gustavus Loevinger, Judge of the District Court.

Dated this 21st day of March, 1938.

A stay of thirty days is granted.

Loevinger, J.

IN DISTRICT COURT OF RAMSEY COUNTY

NOTICE OF APPEAL TO SUPREME COURT—Filed Aug. 4, 1938

To: Doherty, Rumble, Butler, Sullivan & Mitchell, E-1006
1st National Bank Bldg., St. Paul, Minnesota;

R. C. Beckett, Chas. A. Helsell, 135 E. Eleventh Place,
Chicago, Illinois, Attorneys for Defendant;

V. W. Foster, E. C. Craig, 135 E. Eleventh Place, Chicago,
Illinois; of Counsel.

Take Notice that the plaintiff appeals to the Supreme Court from that certain order herein, dated and filed March [fol. 324] 21, 1938, refusing a new trial to plaintiff, and denying plaintiff's alternative motion for an order amending the Court's findings of fact and conclusions of law herein and denying the motion of plaintiff for a new trial, and from the whole thereof.

Dated at St. Paul, Minnesota, this 3rd day of August, 1938.

William S. Ervin, Attorney General, Harry W. Oehler, Assistant Attorney General, Attorneys for Plaintiff, 102 State Capitol, St. Paul, Minnesota.

(Served Aug. 3, 1938 and filed Aug. 4, 1938.)

[fol. 325] IN SUPREME COURT OF MINNESOTA

31910

STATE OF MINNESOTA, Appellant,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation,
Respondent

JUDGMENT—March 14, 1939

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the

order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey be and the same hereby is in all things affirmed.

Dated and signed Mar. 14, 1939.

By the Court.

Attest: Grace Kaercher Davis, Clerk.

[fol. 326] IN DISTRICT COURT OF RAMSEY COUNTY

STATE OF MINNESOTA, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation,
Defendant

NOTICE OF APPEAL—Filed April 18, 1939

To the above named Plaintiff, and to J. A. A. Burnquist, Attorney General, and John A. Weeks, Assistant Attorney General, Attorneys for Plaintiff, and to N. C. Robinson, Esq., Clerk of the above named Court:

You Will Please Take Notice that the defendant appeals to the Supreme Court of the State of Minnesota from the judgment, and the whole thereof, entered herein on the 9th day of April, 1939.

Dated this 17th day of April, 1939.

C. A. Helsell, 135 East 11th Place, Chicago, Illinois;
R. C. Beckett, 135 East 11th Place, Chicago, Illinois;
Doherty, Rumble, Butler, Sullivan & Mitchell,
E-1006 First National Bank Building, Saint Paul,
Minnesota, Attorneys for Defendant.

Due service of the within Notice of Appeal is hereby admitted this 17th day of April, 1939. J. A. Weeks, Asst. Atty. Genl., Attorneys for Plaintiff. N. C. Robinson, Clerk.

[File endorsement omitted.]

[fol. 327] IN DISTRICT COURT OF RAMSEY COUNTY

STATE OF MINNESOTA, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation,
Defendant.

STIPULATION RE BOND ON APPEAL

Whereas, pursuant to written agreement of the parties hereto dated April 25, 1938, a true and correct copy of which is hereto attached, marked Exhibit A, and made a part hereof by reference, the defendant Illinois Central Railroad Company deposited in escrow with the First Trust Company of Saint Paul, St. Paul, Minnesota, United States Government Bonds of the face amount and value of at least Twenty-eight Thousand Five Hundred Dollars (\$28,500.00) in lieu of a supersedeas bond on an appeal to the Supreme Court of the State of Minnesota then being undertaken by the defendant; and

Whereas, judgment was entered herein on the 9th day of April, 1939, in favor of the plaintiff in the sum of Twenty-eight Thousand One Hundred Fifty-seven and 95/100 Dollars (\$28,157.95); and

Whereas, defendant has served notice of appeal from said judgment to the Supreme Court of the State of Minnesota.

Now Therefore, It Is Hereby Stipulated and Agreed, by and between the parties hereto, acting by and through their [fol. 328] respective attorneys that in lieu of a supersedeas bond herein on the appeal now pending that the said bonds shall continue to be held by the First Trust Company under the same terms and conditions as set forth in Exhibit A attached hereto, as security for the payment of costs on this appeal and the damages sustained by the State of Minnesota as respondent in consequence of said appeal if the judgment appealed from be ultimately affirmed or the appeal dismissed, or for compliance with and satisfaction of any judgment or order which the appellate court may give therein, should the appeal, or any part thereof, be decided adversely to the defendant.

Dated April 17th, 1939.

John A. Weeks, Asst. Atty. Gen., Attorneys for Plaintiff; C. A. Helsell, R. C. Beckett; Doherty, Rumble, Butler, Sullivan & Mitchell, Attorneys for Defendant.

[fol. 329] EXHIBIT "A" TO STIPULATION

DISTRICT COURT, SECOND JUDICIAL DISTRICT

STATE OF MINNESOTA,

County of Ramsey;

STATE OF MINNESOTA, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a Corporation, Defendant.

Agreement for Deposit of Bonds in Escrow in Lieu of Supersedeas Bond

This agreement made this 25th day of April, 1938, between the Illinois Central Railroad Company, a corporation, defendant in the above entitled action, and the State of Minnesota, plaintiff therein, witnesseth:

Whereas, the State of Minnesota has brought the above entitled action against the Illinois Central Railroad Company to recover of said company certain alleged unpaid taxes on freight car per diem earnings which it is claimed by the State of Minnesota were omitted by defendant from its returns to said State for the years 1922-1929, inclusive; and

Whereas, said action was tried in the District Court of Ramsey County, Minnesota, and said Court filed findings of fact and conclusions of law and ordered judgment against the defendant in the sum of Twenty-eight Thousand Five Hundred Dollars (\$28,500.00); and

Whereas, defendant thereafter moved said Court for an order amending said findings of fact, conclusions of law, and order for judgment or in the alternative for a new trial of said action, which motion was by order of said Court [fol. 330] dated the nineteenth day of March, 1938, denied; and

Whereas, defendant has served notice of appeal from said order to the Supreme Court of the State of Minnesota, and has heretofore filed with the Clerk of the above named Court a supersedeas bond conditioned as by statute provided; and

Whereas, it is proposed that the defendant deposit in escrow United States Government Bonds of the face amount and of a value at least equal to the sum of Twenty-eight

Thousand Five Hundred Dollars (\$28,500.00) in lieu of said bond;

Now, therefore, in consideration of the foregoing recitals and the covenants herein contained, it is agreed:

That the Illinois Central Railroad Company shall deliver to the First Trust Company of Saint Paul, Saint Paul, Minnesota, United States Government Bonds of the face and market value of not less than Twenty-eight Thousand Five Hundred Dollars (\$28,500.00), to be held by said Trust Company as security for the payment of costs on the appeal and the damages sustained by the State of Minnesota as respondent in consequence of said appeal if the order appealed from be affirmed or the appeal dismissed, and for compliance with and satisfaction of the judgment or order which the said appellate court may give therein, should the appeal be decided adversely to the defendant appellant.

It is further agreed that the supersedeas bond heretofore filed with the Clerk of said Court shall be withdrawn or cancelled as the Court may order, and the American Surety Company, surety thereon, shall be and is by this agreement released from any and all liability thereunder.

It is further agreed that the bonds deposited under this agreement shall not be sold to satisfy said judgment, interest, or costs until and except upon ten days notice to the Illinois Central Railroad Company at its principal office in the City of Chicago, Illinois, it being the intent of this [fol. 331] agreement that said company shall have ten days within which to redeem the said bonds and pay any judgment, interest, and costs which may be entered against it.

It is further agreed that in the event final judgment is entered against the defendant in this action, upon the expiration of such stay of execution as may be entered and thereafter upon defendant's failure to redeem the said bonds within ten days after receipt of notice, the said Trust Company shall deliver said bonds at their then market value or sell the same and deliver the proceeds thereof to the State of Minnesota, upon condition that the said State of Minnesota shall account to the defendant for the excess of any market value or excess in the sale price of said bonds over and above the amount of defendant's indebtedness to the State, if any, as may be finally determined in said action. Interest coupons of said bonds shall be detached and sent to the Illinois Central Railroad Company as they become due.

In witness whereof, the parties hereto have signed this agreement the day and year first above written.

State of Minnesota, by Harry Oehler, Asst. Atty. Gen.

Illinois Central Railroad Company, by Doherty, Rumble, Butler, Sullivan & Mitchell.

The First Trust Company of Saint Paul, Saint Paul, Minnesota, hereby accepts custodianship of said escrow and hereby agrees to act as custodian of the bonds referred to in the aforesaid agreement to be deposited with the said [fol. 332] Trust Company and to carry out the terms and conditions of this deposit, the bonds referred to both in the agreement and this receipt being described as follows:

United States Government bonds, all dated October 15, 1933, bearing interest at $3\frac{1}{4}\%$ per annum and due October 15, 1945, or at the option of the Government due October 15, 1943, and in the following denominations and numbers:

Number of Bonds	Amount	Serial No.
One	\$10,000.00	18579-K
One	10,000.00	18580-L
One	5,000.00	4593-C
One	1,000.00	239672-B
One	1,000.00	239673-C
One	1,000.00	239674-D
One	500.00	49312-B

First Trust Company of Saint Paul, Louis S. Headley, V. Pres.

11/25/38.

[fol. 333] IN SUPREME COURT OF MINNESOTA

32158

STATE OF MINNESOTA, Plaintiff-Respondent,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a corporation, Defendant-Appellant

STIPULATION SUBMITTING APPEAL

It is hereby stipulated, that the appeal now pending from a final judgment of the District Court of Ramsey County,

State of Minnesota, duly entered April 9th, 1939, in the above entitled action in favor of the plaintiff-respondent, may be and is hereby submitted to the Supreme Court of the State of Minnesota for its decision, without further argument upon the printed record, briefs of the parties heretofore filed, with an additional brief by appellant to which the respondent may reply at any time within thirty (30) days after the date of this stipulation, and all other proceedings had or taken in a former appeal by the defendant-appellant in this same cause to this court from an order dated March 19, 1938, denying defendant's alternative motion for an order amending the court's findings of fact and conclusions of law herein, and for a new trial, and which appeal is known as No. 31791 on the records of this court, and which order denying said alternative motion was affirmed by this court February 17, 1939, and the judgment subsequently entered by said District Court, and in the event said judgment in said District Court be affirmed by this court no further remittitur be sent to said District Court, it being the purpose of this stipulation that any such judgment of affirmance may be entered as a final [fol. 334] judgment of the court for the purpose of the defendant-appellant if it so elects perfecting its appeal or presenting a petition for a writ of certiorari to the United States Supreme Court to review such final judgment of this court.

It is further stipulated that nothing herein shall be construed as a consent by defendant-appellant to the entry of any judgment against it or as a waiver of any of its assignments of error in the entry of any such judgment; defendant-appellant expressly reserving and claiming the right to have all questions arising on the entry of said final judgment and proceedings prior thereto reviewed by the United States Supreme Court.

Dated May 4, 1939.

J. A. A. Burnquist, Atty. Gen., by John A. Weeks,
Asst. Atty. Gen., Attorneys for Plaintiff-Respondent.

Doherty, Rumble, Butler, Sullivan & Mitchell, R. C.
Beckett, CHAS. A. Helsell, Attorneys for Defendant-Appellant.

[fol. 335] IN SUPREME COURT OF MINNESOTA

32158

[Title omitted]

ORDER OF SUBMISSION—Filed May 4, 1939

Ordered that the appeal in the above-entitled matter be submitted to the Court without further oral argument upon the printed record and briefs of the parties heretofore filed (with one additional printed brief if either party desires to file one within thirty (30) days after the 4th day of May, 1939), in case No. 31791 bearing the same title, together with the files of the District Court of Ramsey County, Minnesota, showing subsequent proceedings had in that court.

Dated May 4th, 1939.

Henry M. Gallagher, Chief Justice.

[File endorsement omitted.]

[fol. 336] IN DISTRICT COURT, SECOND JUDICIAL DISTRICT,
COUNTY OF RAMSEY

212091

STATE OF MINNESOTA, Plaintiff,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY, a corporation,
Defendant.

JUDGMENT—April 9, 1939

The above entitled matter came on for hearing before the undersigned, one of the judges of this Court, without a jury, at a general term of this court held in the Court House in Ramsey County, Minnesota on January 13th, 1938, and subsequent days. The case had been tried once before in the Dist. Court of Ramsey County and appealed to the State Supreme Court. A rehearing was denied by the Supreme Court. State vs. Illinois Central R. R. Co., 200 Minn. 583, 274 N. W. 828 and 275 N. W. 854.

William S. Ervin Attorney General and Harry W. Oehler, Asst. Attorney General, 102 State Capitol, appeared as at-

torneys for plaintiff, and Doherty, Rumble, Butler, Sullivan and Mitchell, First National Bank Building, St. Paul, Minnesota, and R. C. Beckett and Chas. A. Helsell, 135 E. 11th Place, Chicago, Illinois, appeared as attorneys for defendant, with V. W. Foster and E. C. Craig, of counsel for defendant.

Thereafter, and at the time of the making and filing of this decree, J. A. A. Burnquist, Attorney General and John A. Weeks, assistant Attorney General, 102 State Capitol, then appeared as attorneys for plaintiff.

The Supreme Court remanded the case for a limited new trial as indicated in quotations from its opinions, and set forth in the findings of fact and conclusions of law heretofore made and filed herein by the undersigned judge of this Court.

After the last hearing had herein on January 13th, 1938, and subsequent days, and as referred to above, both parties appealed to the Supreme Court from orders denying their respective motions for new trials. On February 17th, 1939, the orders appealed from in both appeals were affirmed.

Now upon all the files, records, findings and proceedings heretofore had herein, including the remittiturs in all of said appeals, it is

[fol. 337] Ordered, Adjudged and Decreed that the State of Minnesota is entitled to recover from the defendant the sum of \$26,414.59, with interest thereon at the rate of 6% per annum from and after the filing of the findings herein (March 3, 1938, amounting to seventeen hundred forty-three and 36/100 Dollars, Total \$28,157.95) together with its costs and disbursements herein.

N. C. Robinson, Clerk. John A. Hanggi, Deputy.

Form approved 4/8/39.

Gustavus Loevinger, District Judge.

Signed April 9, 1939.

Costs taxed April 13, 1939, in the sum of \$17.00.

N. C. Robinson, Clerk. By John A. Hanggi, Deputy.

[fols. 338-340] [Clerk's Certificate to foregoing omitted in printing]

[File endorsement omitted.]

[fol. 341] IN SUPREME COURT OF MINNESOTA, RAMSEY
COUNTY

32158

STATE OF MINNESOTA, Respondent,
vs.

ILLINOIS CENTRAL RAILROAD Co., Appellant.

OPINION—Filed June 16, 1939

Per Curiam.

Defendant appeals from the judgment entered in the court below after the orders denying the motions of both parties for amended findings or a new trial were affirmed. Decision filed February 17, 1939, rehearing denied March 14, 1939, 284 N. W. 360.

The errors assigned and urged on this appeal were presented on the former appeal and the decision therein must be considered final so far as this court is concerned. It having been found that the Burlington formula for computing the tax on freight car per diem earnings was proper, and that the one proposed by defendant "is not a better formula than the Burlington" it follows that the tax computed according to the Burlington formula violates no provision of the constitution of this state, and we are unable to see that the 14th amendment or any other provision of the federal constitution is violated by the judgment rendered.

The judgment is affirmed.

Mr. Justice Hilton and Mr. Justice Peterson took no part.

[fol. 342] IN SUPREME COURT OF MINNESOTA .

32158

STATE OF MINNESOTA, Respondent,
vs.

ILLINOIS CENTRAL RAILROAD Co., Appellant.

JUDGMENT—June 30, 1939

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the

judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County Ramsey be and the same hereby is in all things affirmed

Dated and signed June 30, 1939 by the Court.

Attest: Grace Kaercher Davis, Clerk.

[fol. 342½] [File endorsement omitted.]

[fol. 343] IN SUPREME COURT OF MINNESOTA

32158

[Title omitted]

STIPULATION RE SUPERSEDEAS BOND ON APPEAL—Filed July 5, 1939

Whereas, pursuant to written agreement of the parties hereto dated April 25, 1938, a true and correct copy of which is hereto attached, marked Exhibit A, and made a part hereof by reference, the defendant Illinois Central Railroad Company deposited in escrow with the First Trust Company of Saint Paul, St. Paul, Minnesota, United States Government Bonds of the face amount and value of at least Twenty-eight Thousand Five Hundred Dollars (\$28,500.00) in lieu of a supersedeas bond on an appeal to the Supreme Court of the State of Minnesota then being undertaken by the defendant; and

Whereas, judgment was entered in the District Court of Ramsey County, Minnesota, on the 9th day of April, 1939, in favor of the Respondent in the sum of Twenty-eight Thousand One Hundred Fifty-seven and 95/100 Dollars (\$28,157.95); and said judgment was affirmed by the Supreme Court of the State of Minnesota on the 16th day of June, 1939; and

Whereas, appellant is now perfecting an appeal from said judgment to the Supreme Court of the United States,

[fol. 344] Now Therefore, it is Hereby Stipulated and Agreed, by and between the parties hereto, acting by and through their respective attorneys that in lieu of a supersedeas bond herein on the appeal to the Supreme Court of the United States now pending that the said bonds shall continue to be held by the First Trust Company under the

same terms and conditions as set forth in Exhibit A attached hereto, as security that appellant will prosecute this appeal to effect and for the payment of all costs if appellant fail to make its plea good on this appeal and the damages sustained by the State of Minnesota as respondent in consequence of said appeal if the judgment appealed from be ultimately affirmed or the appeal dismissed, or for compliance with and satisfaction of any judgment or order which the appellate court may give therein, should the appeal, or any part thereof, be decided adversely to the defendant.

Dated June 26, 1939.

J. A. A. Burnquist and John A. Weeks, Attorneys for Respondent.

Doherty, Rumble, Butler, Sullivan & Mitchell, R. C. Beckett, Chas. A. Helsell Attorneys for Appellant.

[fols. 345-348] Exhibit "A" to stipulation omitted. Printed side page. 329 ante.

[fol. 348½] [File endorsement omitted.]

[fol. 349] Due service of the within Petition for Appeal is hereby admitted this 30th day of June, 1939.

J. A. A. Burnquist, Attorneys for Respondent.

IN SUPREME COURT OF MINNESOTA

No. 32158.

[Title omitted]

PETITION FOR APPEAL—Filed July 5, 1939

Considering itself aggrieved by the final decision of the Supreme Court of the State of Minnesota in the above entitled cause, the defendant therein, the Illinois Central Railroad Company, hereby prays that an appeal be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond thereon.

Doherty, Rumble, Butler, Sullivan & Mitchell, R. C. Beckett, Chas. A. Helsell, Attorneys for Appellant.

V. W. Foster and E. C. Craig, Of Counsel.

[fol. 349½] [File endorsement omitted.]

Due service of the within Assignment of Errors and Prayer for Reversal is hereby admitted this 30th day of June, 1939.

J. A. A. Burnquist, Attorneys for Respondent.

[fol. 350] IN SUPREME COURT OF MINNESOTA

No. 32158.

[Title omitted]

ASSIGNMENT OF ERRORS—Filed July 5, 1939

The Illinois Central Railroad Company assigns the following errors in the record and proceedings in the said case:

I.

The Supreme Court of the State of Minnesota erred in affirming the judgment against Illinois Central Railroad Company, of the District Court of Ramsey County for \$28,157.93.

II.

The Supreme Court of the State of Minnesota erred in adopting and holding that the so-called Burlington formula should be applied instead of the formula shown on Exhibit 2, being that prescribed under legislative authority by the Public Examiner and Tax Commission for the years in question,

III.

The Supreme Court of the State of Minnesota erred in holding that the gross earnings statute of that state (Secs. [fol. 351] 2246-2235, incl. Mason's Rev. Stats. 1927), construed so as to permit the application of the Burlington formula was constitutional.

IV.

The court erred in holding that the statute so construed as to permit the application of the Burlington formula does not deprive defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

V.

The court erred in holding that the statute, construed so as to permit the application of the Burlington formula for the years 1922-1929, inclusive, does not violate Section 1, Article XIV of the Constitution of the United States in that the retroactive application in 1935 (when it was suggested in a motion for new trial) or on April 9, 1939 (the date of the entry of the judgment herein), to earnings in 1922-29, is so arbitrary, unreasonable and capricious as to take defendant's property without due process of law.

VI.

The court erred in construing the statute so as to permit the application of the Burlington formula for the reason that it is so inaccurate as an approximation in lieu of the real facts that the imposition of a tax based on it is the taking of property without due process.

VII.

The court erred in construing the Minnesota gross earnings statute so as to permit the application of the Burlington formula for the reason that the Minnesota gross earnings tax on railroads is a property tax. Under such system [fol. 352] of taxation, property in the hands of the lessee is fully taxed when the lessee's earnings are taxed. To tax the rentals received by the lessor at the same time the earnings from operation received from the lessee are being taxed, is double taxation and unequal taxation in violation of the commerce clause and the equal protection clause of the federal Constitution.

VIII.

The court erred in construing the Minnesota gross earnings statute so as to permit the application of the Burlington formula for the reason that the tax on freight car per diem rentals of plaintiff's cars while on other railroads is an attempted taxation of these cars themselves while in the status of tangible personal property in transit in the course of interstate commerce. Such a tax is a taxation of property of which the State of Minnesota has no taxing jurisdiction, and amounts to the taking of property without due process in violation of the Fourteenth Amendment to the federal Constitution.

IX.

It is error to apply the Burlington formula, whether dependent upon a construction of the gross earnings statute or not, for the reasons:

(a) That it is so grossly inaccurate as to be arbitrary, capricious and unreasonable in violation of the due process clause of the Fourteenth Amendment of the federal Constitution;

(b) It denies appellant the equal protection of the laws;

(c) It takes appellant's property without due process of law in that it is retroactively applied to an unreasonable and arbitrary extent;

(d) It is an unreasonable burden on interstate commerce.

[fol. 353]

PRAYER FOR REVERSAL

For which errors the defendant, Illinois Central Railroad Company, prays that the said judgment of the Supreme Court of the State of Minnesota dated June 16, 1939, in the above entitled cause be reversed and a judgment rendered in favor of the said defendant, and for costs.

Doherty, Rumble, Butler, Sullivan & Mitchell, R. C.
Beckett, Chas. A. Helsell, Attorneys for Appellant.

V. W. Foster and E. C. Craig, Of Counsel.

[fol. 353½] Due service of the within Order Allowing Appeal is hereby admitted this 30th day of June, 1939.

J. A. A. Burnquist, Attorneys for Respondent:

[File endorsement omitted]

[fol. 354] IN SUPREME COURT OF MINNESOTA

No. 32158

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 5, 1939

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and

entered in the above entitled suit by the Supreme Court of the State of Minnesota on the 30th day of June, 1939 and from each and every part thereof, now having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Minnesota in the above entitled cause; and

It is further ordered that the Clerk of the Supreme Court of the State of Minnesota shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United [fol. 355] States, so that he shall have the same in said court within thirty days of this date; and

It is further ordered that stipulation of the parties providing for the deposit of government bonds in escrow to serve as a supersedeas on such appeal be and the same is hereby approved.

Dated this 30th day of June, 1939.

Henry M. Gallagher, Chief Justice of the Supreme Court of Minnesota.

[fol. 355½] [File endorsement omitted]

[fol. 356] Citation in usual form showing service on J. A. A. Burnquist filed July 5, 1939 omitted in printing.

[fols. 357-379] Due service of the within Praeipe for Transcript is hereby admitted this 1st day of July, 1939.

J. A. A. Burnquist, Attorneys for Respondent.

[fol. 380] IN SUPREME COURT OF THE UNITED STATES

No. 32158

[Title omitted]

PRAEPIPE FOR TRANSCRIPT OF RECORD—Filed July 5, 1939

To the Clerk of the Supreme Court of the State of Minnesota:

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United

States Supreme Court in proceedings therein pending for an appeal and include in said transcript the following:

1. Record in your file No. 31216.
2. Opinion of the Supreme Court of the State of Minnesota in your file No. 31216, dated September 10, 1937.
3. Opinion of the Supreme Court of the State of Minnesota in your file No. 31216, dated October 22, 1937.
4. Transcript of judgment in your file No. 31216.
5. Record in your file No. 31791.
6. Opinion of the Supreme Court of the State of Minnesota in your file No. 31791, dated February 17, 1939.
7. Transcript of judgment in your file No. 31791.
8. Supplemental record in your file No. 31910.
- [fol. 381]. 9. Opinion of the Supreme Court of the State of Minnesota in your file No. 31910.
10. Transcript of judgment in your file No. 31910.
11. Notice of appeal in your file No. 32158.
12. Stipulation re bond on appeal in your file No. 32158.
13. Stipulation submitting appeal covered by your file No. 32158, upon additional briefs and on the records filed in your appeal case files numbered 31216, 31791 and 31910.
14. Order allowing submission of case on the foregoing stipulation.
15. Exhibits of the State of Minnesota No. A and B.
16. Exhibits of the Appellant Illinois Central Railroad Company numbered 1 to 26 inclusive, except exhibits 2-19-22.
17. Certified copy of transcript of judgment in the District Court, Second Judicial District, Ramsey County, Minnesota, dated on or about the 9th day of April, 1939.
18. Opinion of the Supreme Court of the State of Minnesota in your file No. 32158.
19. Transcript of judgment of the Supreme Court of the State of Minnesota in your file No. 32158.
20. Stipulation re supersedeas bond on appeal to the Supreme Court of the United States.
21. Petition for appeal to the Supreme Court of the United States with admission of service thereon.
22. Assignment of errors and prayer for reversal with admission of service thereon.
23. Order allowing appeal to the Supreme Court of the United States with admission of service thereon.
24. Citation on appeal to Appellee with admission of service thereon.

25. Jurisdictional statement with admission of service thereon.

26. Statement to Appellee directing its attention to the provisions of paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States with admission of service thereon.

[fol. 382] 27. This praecipe.

28. Clerk's certificate to transcript dated July 5th, 1939.

Doherty, Bumble, Butler, Sullivan & Mitchell, R. C.
Beckett, Chas. A. Helsell, Attorneys for Appellant.

V. W. Foster and E. C. Craig, Of Counsel.

[fol. 382½] [File endorsement omitted.]

[fol. 383] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 384] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF THE POINTS ON WHICH APPELLANT RELIES AND
THE PARTS OF THE RECORD THOUGHT NECESSARY FOR CON-
SIDERATION THEREOF—Filed July 24, 1939

Appellant intends to rely upon the contentions that the Supreme Court of Minnesota erred:

1. In affirming the judgment against Illinois Central Railroad Company, of the District Court of Ramsey County for \$28,157.93, being the alleged amount of omitted gross earnings taxes on freight car per diem credits during the years 1922 to 1929, inclusive.

2. In adopting and holding that the so-called Burlington formula should be applied instead of the formula shown on Exhibit 2, being that prescribed under legislative authority by the Public Examiner and Tax Commission for the years in question, with which appellant complied in making its returns.

3. In holding that the gross earnings statute of the State of Minnesota (Secs. 2246-2255, incl., Mason's Rev. Stats. 1927), construed so as to permit the application of the

Burlington formula, does not contravene the provisions of the Constitution of the United States pleaded in the answer.

[fol. 385] 4. In holding that the said statute so construed as to permit the application of the Burlington formula does not deprive defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

5. In holding that the statute, construed so as to permit the application of the Burlington formula for the years 1922-1929, inclusive, does not violate Section 1, Article XIV of the Constitution of the United States in that the retroactive application in 1935 (when it was suggested in a motion for new trial) or on June 16, 1939 (the date of the entry of the judgment herein), to earnings in 1922 to 1929, is so arbitrary, unreasonable and capricious as to take defendant's property without due process of law.

6. In construing the statute so as to permit the application of the Burlington formula for the reason that it is so inaccurate as an approximation in lieu of the real facts that the imposition of a tax based on it is the taking of property without due process.

7. In construing the Minnesota gross earnings statute so as to permit the application of the Burlington formula because the Minnesota gross earnings tax on railroads is a property tax; that under such system of taxation, property in the hands of the lessee is fully taxed when the lessee's earnings are taxed; that to tax the rentals received by the lessor and also at the same time earnings from operation received from the lessee, is double, discriminatory and unequal taxation in violation of the commerce clause and the equal protection clause of the federal Constitution.

[fol. 386] 8. In construing the Minnesota gross earnings statute so as to permit the application of the Burlington formula for the reason that the tax on freight car per diem rentals of plaintiff's cars while on other railroads is an attempted taxation of these cars themselves while in the status of tangible personal property in transit in the course of interstate commerce. Such a tax is a taxation of property of which the State of Minnesota has no taxing jurisdiction, and amounts to the taking of property without due process in violation of the Fourteenth Amendment to the federal Constitution.

9. In applying the Burlington formula, whether such application be considered legislation by the Court or the Commission, or whether dependent upon a construction of the gross earnings statute, for the reasons:

(a) That it is so grossly inaccurate as to be arbitrary, capricious and unreasonable in violation of the due process clause of the Fourteenth Amendment of the federal Constitution;

(b) It denies appellant the equal protection of the laws;

(c) It takes appellant's property without due process of law in that it is retroactively applied to an unreasonable and arbitrary extent;

(d) It is an unreasonable burden on interstate commerce.

Appellant deems the entire record, including of the Exhibits, except as shown in the printed records on the appeals to the Supreme Court of Minnesota, defendant's Exhibit 2 only, to be necessary for the consideration of the [fol. 387] contentions above enumerated.

Doherty, Rumble, Butler, Sullivan & Mitchell, First National Bank Building, St. Paul, Minnesota:
R. C. Beckett, Chas. A. Helsell, 135 East 11th Place, Chicago, Illinois. Attorneys for Appellant,
Illinois Central Railroad Company.

E. C. Craig, V. W. Foster, 135 East 11th Place, Chicago, Illinois. Of Counsel:

Service of the foregoing statement of points is hereby accepted and copy acknowledged on behalf of appellee this 22nd day of July, 1939.

J. A. A. Burnquist, John A. Weeks, Attorneys for Appellee, State of Minnesota.

[fol. 387½] [File endorsement omitted.]

[fol. 388] IN SUPREME COURT OF THE UNITED STATES

STIPULATION RE EXHIBIT No. 2—Filed Aug. 21, 1939

It is Stipulated and Agreed between the parties that the original Exhibit 2, being duplicate copy of the return made by the Dubuque and Sioux City Railroad Company

for the six months ended June 30, 1922 to the State of Minnesota of its gross earnings, shall be accepted by the Clerk and printed in the record in lieu of the photostatic copy which is missing from the exhibits and which was substituted for the duplicate original at the trial.

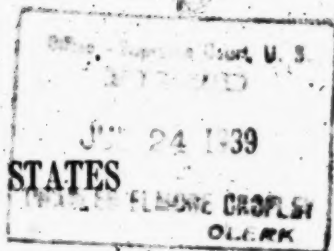
Chas. A. Helsell, R. C. Beckett, Doherty, Rumble, Butler, Sullivan & Mitchell, Attorneys for Illinois Central Railroad Company, Appellant. J. A. A. Burnquist, John A. Weeks, Attorneys for State of Minnesota.

[fol. 389] [File endorsement omitted.]

[Endorsed on cover:] File No. 43,629, Minnesota Supreme Court, Term No. 222. Illinois Central Railroad Company, Appellant, vs. State of Minnesota. Filed July 24, 1939. Term No. 222, O. T., 1939.

(4548)

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

STATEMENT AS TO JURISDICTION.

DOHERTY, RUMBLE, BUTLER, SULLIVAN

& MITCHELL,

R. C. BECKETT,

CHAS. A. HEISELL,

Counsel for Appellant.

V. W. FOSTER,

E. C. CRAIG,

Of Counsel.

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STATE OF MINNESOTA, IN SUPREME COURT

No. 32158.

STATE OF MINNESOTA,

vs.

Respondent,

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellant.

**BASIS UPON WHICH IT IS CONTENDED THE
SUPREME COURT OF THE UNITED STATES
HAS JURISDICTION.**

It is provided by Section 237 Judicial Code, as amended
(28 U. S. C., Sec. 344(a)):

“A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal.”

Section 2246 Mason's Revised Statutes of the State of Minnesota, 1927, provides (Vol. 1, p. 544):

“Gross earnings—Every railroad company owning or operating any line of railroad situated within or

partly within this state, shall, during the year 1913 and annually thereafter, pay into the treasury of the state, in lieu of all taxes, upon all property within this state owned or operated for railway purposes, by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state.

"On or before August 15, 1913, and annually thereafter, each such railroad shall make, according to law, a true and just return of all such gross earnings for the six months ending June 30th next preceding, and the said tax of five per centum thereon shall become due and payable to the State of Minnesota in manner provided by law, on September 1st next thereafter.

"On or before February 15, 1914, and annually thereafter, each such railroad company shall make, according to law, a true and just return of all such gross earnings for the six months ending December 31st next preceding, and said tax of five per centum thereon shall become due and payable to the State of Minnesota in manner provided by law, on March 1st next thereafter; and the payments of such sums at the times hereinbefore set forth shall be in full and in lieu of all other taxes upon the property and franchises so taxed."

Section 2247 Minnesota Revised Statutes provides (Vol. 1, p. 545):

" 'Gross earnings' defined—The term 'the gross earnings derived from the operation of such line of railway within this state,' as used in section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state."

On June 16, 1939, by opinion filed in the office of the Clerk of the Supreme Court of the State of Minnesota on that date the Supreme Court affirmed the judgment of the District Court of Ramsey County, Minnesota against defendant in the sum of \$28,157.95, being the alleged amount of omitted gross earnings taxes for the years 1922 to 1929, inclusive. Judgment based on this decision was entered against appellant on the 30th day of June, 1939, in the sum of \$28,157.95. Application for an order allowing this appeal was made to the Chief Justice of the Supreme Court of Minnesota on the 30th day of June, 1939.

The affirmance of the judgment by the Supreme Court of Minnesota on June 16, 1939, and the entry of judgment thereon on the 30th day of June, 1939, was the first final judgment in this cause, although the case had been before the Supreme Court of Minnesota on two previous occasions, the decisions being reported in *State v. Illinois Central Railroad Co.*, 274 N. W. 829, 200 Minn. 583; rehearing denied, 275 N. W. 854; on the second appeal reported in 284 N. W. 360, and on the third appeal reported in — N. W. —. The three decisions of the court on these appeals and the decision on petition for rehearing are attached hereto and by reference made a part hereof.

Nature of the Case.

The action was brought in March, 1934 by the State of Minnesota in the District Court of Ramsey County to recover the amount of alleged omitted gross earnings from freight car per diem receipts for the years 1922 to 1929, inclusive. The amount sought to be recovered was \$89,724.36 with statutory penalties and interest. This amount was computed in accord with a formula which appeared from the figures set forth in the complaint, but which formula was subsequently abandoned at the trial when found to be impracticable. After the conclusion of the first trial

in the District Court and for the first time claim was made by the State in a motion for new trial to recover under the so-called Burlington formula, a formula never pleaded, never adopted as required by the statute, by the State examiner (later comptroller) with the approval of the Tax Commission, and only used by the State in the compromise settlement of several other lawsuits against other carriers. Appellant had paid its taxes during the years in question (1922-1929) in exact accord with the system of accounting prescribed by the State:

The Minnesota statute (Sec. 2239, Mason's Revised Stats. 1927, p. 544) specifically authorizing the public examiner, not the court, to prescribe the system of accounts or formula, reads as follows:

"Uniform system of accounting—The public examiner, with the approval of the tax commission, shall have authority and power to prescribe for such companies, joint stock associations, co-partnerships, corporations, or individuals a system of gross earnings accounts, that shall be uniform for each class of companies, and he shall supervise the method of keeping such accounts; provided, that such system shall conform as nearly as practicable with that prescribed for such companies by the United States government."

The State of Minnesota appealed from the first judgment in its favor amounting to \$12,866.50, which amount was arrived at under a formula advanced by the trial court. This formula was rejected and the judgment reversed on the State's appeal. (*State v. Illinois Central Railroad Co.*, 200 Minn. 583, 274 N. W. 829.)

On the second trial the District Court adopted the Burlington formula and denied the motions of both parties for amended findings and for a new trial. This was affirmed (*State v. Illinois Central Railroad Co.*, 284 N. W. 360). The case was remanded to the District Court for the entry of

judgment, from which the third appeal was taken, the judgment was affirmed June 16, 1939, and judgment entered in the Supreme Court of Minnesota on the 30th day of June, 1939.

It is contended that the Supreme Court of the United States has jurisdiction of this appeal under the specific provisions of Section 237 of the Judicial Code, as amended (28 U. S. C., Sec. 344(a)). Since the Supreme Court of Minnesota has upheld the validity of the statute notwithstanding appellant's contention that the State's construction of such statute violates the Federal Constitution, defendant is entitled to this appeal. *West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 57 S. Ct. 578, 81 L. Ed. 703.

A "statute of any state," decision concerning the constitutionality of which may be reviewed on appeal, is not limited to enactments of the State legislature, but includes every act, legislative in character, to which the State gives the force of law, such as an order of a State tax commission, or the decision of a court substituting its choice of a formula for that prescribed by the commission.

King Mfg. Co. v. City Council of Augusta (1928), 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801;

Live Oak Water Users' Ass'n v. Railroad Commission of State of California (1926), 269 U. S. 354, 46 S. Ct. 149, 70 L. Ed. 305;

Hamilton v. Regents of University of California (1934), 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343;

Lake Erie & Western R. R. Co. v. State Public Commission ex rel. Cameron, 249 U. S. 422-4;

• *Sultan Ry. Co. v. Dept. of Labor*, 277 U. S. 135.

Constitutional Questions Raised.

The questions involved are substantial. Notwithstanding the objections made on constitutional grounds, the State of Minnesota seeks to collect by suit brought in 1934, under

a formula suggested to the court in a motion for new-trial filed in 1935, some \$89,000 in taxes on freight car *per diem* earnings alleged to have been earned in 1922 to 1929, inclusive. The additional taxes are sought to be collected notwithstanding the admitted fact that the railroad company paid every cent of taxes due under the formula prescribed by the State Comptroller and Tax Commission acting under specific statutory authority for the years in question. There is involved the right of the Minnesota court to adopt a formula, under which part of appellant's alleged gross earnings are allocated to Minnesota for taxation, notwithstanding the existence of a specific statute vesting such authority in the Comptroller and Tax Commission of the State.

There is further involved the right of the State to apply such formula retroactively to years antedating the application by as much as thirteen years. There is further involved the right of the State to adopt a formula which, as shown without dispute in the record, results in the payment of no tax whatever by most of the roads in the State and by many which do many times more business in the State than appellant.

The constitutional objections now relied upon were raised in the answer filed in the District Court of Ramsey County, Minnesota, on which the case was first tried; were renewed at the time of the first appeal taken by the State and were again renewed on the second and third appeals.

These objections, more specifically shown in the assignment of errors, are: That the gross earnings statute of the State of Minnesota, construed so as to permit the application of the Burlington formula, deprives defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States; that the statute construed so as to permit the application of the Burlington formula and retroactively applied in 1939 (or 1935 when it was first suggested in the State's motion for a new trial) to the years in question, 1922 to 1929, in-

clusive, becomes so arbitrary, unreasonable and capricious as to take defendant's property without due process of law; that the statute construed to permit the application of the Burlington formula is so inaccurate an approximation in lieu of the real facts that the imposition of a tax based thereon is the taking of property without due process; that such construction of the statute, which by its terms imposes a property tax, permits double and unequal taxation in violation of the commerce clause and equal protection clause of the Federal Constitution; that such a construction results in an unreasonable burden on interstate commerce in that it is a tax on cars in transit which do not have a taxable *situs* in Minnesota; and finally, that the application of the so-called Burlington formula whether dependent upon a construction of the gross earnings statute or not, is so grossly inaccurate, arbitrary, capricious and unreasonable as to violate the due process clause, the equal protection clause and constitutes an unreasonable burden on interstate commerce.

WHEREFORE, Appellant respectfully submits that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in this action.

DOHERTY, RUMBLE, BUTLER, SULLIVAN
& MITCHELL,

*First Nat'l Bank Building,
St. Paul, Minnesota.*

R. C. BECKETT,
CHAS. A. HEISELL,

*135 East 11th Place,
Chicago, Illinois.*

V. W. FOSTER,
E. C. CRAIG,

*135 East 11th Place,
Chicago, Illinois,*

Of Counsel.

EXHIBIT "A".**STATE V. ILLINOIS CENT. R. CO.****No. 31216.****Supreme Court of Minnesota.****Sept. 10, 1937 (274 N. W. 828).**

Appeal from District Court, Ramsey County; James C. Michael, Judge.

Action by the State against the Illinois Central Railroad Company. From the judgment, the State appeals.

Affirmed in part, and reversed in part, with directions for a new trial.

William S. Ervin, Atty. Gen., and Harry W. Oehler, Asst. Atty. Gen., for the State.

Doherty, Rumble, Butler, Sullivan & Mitchell, of St. Paul, and R. C. Beckett and Chas. A. Helsell; both of Chicago, Ill. (V. W. Foster and E. C. Craig, both of Chicago, Ill., of counsel), for respondent.

STONE, Justice.

The state sues defendant for a 5 per cent gross earnings tax on income from freight car per diem rentals for a period of eight years, 1922 to 1929, inclusive. The amount claimed was \$89,724.36. The state got judgment for \$12,866.50, from which it appeals.

Mason's Minn. St. 1927, Sec. 2246, provides: "Every railroad company owning or operating any line of railroad situated within or partly within this state, shall, . . . pay . . . in lieu of all taxes, upon all property within this state owned or operated for railway purposes, by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state."

Under Section 2247, "gross earnings" mean "all earnings on business beginning and ending within the state, and

a proportion, based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state."

Under the rule of *State v. Minnesota & International Ry. Co.*, 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426, only the amount received by a railroad company operating in Minnesota, for use of its cars, in excess of what it pays for the use of cars of other companies, is included in taxable gross earnings. In practice, accounts are kept between the railroad companies and system balances struck and settled monthly. Because Minnesota can tax no property beyond its own borders and because our gross earnings tax is a levy in lieu of all others on the Minnesota property of railroads operating here (Mason's Minn. St. 1927, Sec. 2246), the incidence of the tax on car rentals is limited by the rule of *State v. G. N. Ry. Co.*, 163 Minn. 88, 203 N. W. 453. That rule is this: In order to determine whether a credit balance for car rentals is to constitute gross earnings of the creditor road taxable in Minnesota, "all rentals derived from the use of the cars by companies operating no lines within the state must be excluded, and no more included of rentals from foreign companies extending into the state than the proportion earned from use within the state" of the creditor's cars.

It is of the theory of the case, implicit in the record, the decision below, and all argument here, that, where interstate apportionment of car rentals is needful, it is to be made on the basis of "loaded freight car mileage" (for brevity to be hereinafter indicated merely as mileage). On that basis, therefore, we consider and decide the case.

Defendant is a foreign railroad corporation organized under the laws of Illinois. Since 1904, it has operated, as lessee of the Dubuque & Sioux City Railroad, some 30.15 miles of trackage in Minnesota. Defendant has exchanged freight cars with other roads operating within and without Minnesota. Pursuant to the universal contract among all roads in the United States, the using road is charged one dollar per day per car while in its possession. During the involved eight years, defendant had credits in its favor for

per diem use of its cars by other railroads amounting to \$17,427,861.79 and debits in the sum of \$14,924,508.63.

The Minnesota Tax Commission had promulgated rules and furnished printed forms for returns. The rules incorporated that of *State v. Minnesota & International Ry. Co.*, 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426, together with the following: "Note—You are to report to the State of Minnesota for taxation purposes, (a) the credit balance, if any, on freight equipment used in transportation service and interchanged with foreign roads on the per diem or mileage basis. Minnesota proportion of said credit balance to be computed by applying the percentage that the average revenue freight car mileage in Minnesota bears to the total average revenue freight car mileage of the entire line during the calendar year."

Made as so required, defendant duly filed returns for every year in controversy. All were accepted by the state, and defendant promptly paid the tax computed thereon. (Those returns used what is now referred to as "defendant's formula." Defendant modestly disclaims its authorship and refers to it as the state's old formula.)

In 1933 the Minnesota Tax Commission adopted a new theory. In the meantime, in the language of Judge Michael: "The defendant's records which would show the number of days its freight cars were in possession of other Minnesota roads, in Minnesota during said eight-year period, were, pursuant to the rules of the Interstate Commerce Commission, destroyed by defendant before this controversy arose, so that the number of car days to be apportioned to Minnesota cannot be determined to a mathematical certainty." That would be impossible in any event because the best of practicable records would seldom if ever disclose just when or where a freight car crossed a state line. The most practicably possible is a record, approximately accurate, of the time freight cars are in use by lines other than the owner.

Upon the state's new formula this suit was based. It ignored the necessity for first getting system balances. Any credit to defendant, although on the system balance more than offset and defendant indebted to the other road, was sought to be taxed. By so much there was attempt to

tax something not an earning. See *State v. Minnesota & International Ry. Co.*, 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426. That doubtless explains why this new formula, has been frankly abandoned by the state.

"Using road" is a self-defining phrase. The "reporting road" is the one making the returns of taxable gross earnings. In the case of the latter's debit balances for car rentals, it is both the using and reporting road. Defendant's mileage in Minnesota is taken as .11 of one per centum of that of its entire system. The application, for present purposes, of that percentage to its own net system credit balances is indefensible for the simple reason that it helps not at all in ascertaining the amount of car rentals earned by defendant's cars in use by other roads in Minnesota. Plainly, for that purpose, the factor of allocation must be the extent of the use of the cars in Minnesota. The reporting or owning road's Minnesota proportion of its whole mileage is in consequence irrelevant; and the Minnesota proportion of the using road's determinative. Because the so-called defendant's formula used the former, erroneous ratio (that of the reporting road), it was properly rejected below.

Judge Michael used a method of his own. Between the defendant and all other lines he first struck one balance for the eight years (by deducting total debits from total credits), to which, for the purpose of determining the Minnesota proportion, he applied the *average* percentage (10.39) that all of the using roads' mileage in Minnesota bears to their total mileage. The Minnesota proportion of defendant's gross credits for the eight years (\$17,427,861.79) was \$1,811,181.03, or 10.39 per cent of the whole. That rate was taken as indicating the extent of the Minnesota use of defendant's cars by other lines for all the years. *The figures for each system and year were not made or taken separately.*

That method worked out as follows:

Defendant's total credits for the 8 years	\$17,427,861
Defendant's total debits for the 8 years	14,924,508
	<hr/>
	\$2,503,353

Taking the credit balance of \$2,503,353 as defendant's system earnings from car rentals, and 10.39 per cent thereof as allocable to Minnesota, gives the sum of \$260,088. One more subtraction was made, .11 per cent thereof, or \$2,753, making the net sum subjected to tax by the decision below \$257,350.

The last allowance was fixed by the fact that only .11 per cent of defendant's mileage is in Minnesota. It was erroneous, we hold, because defendant had already been given credit for all debit balances, i.e., for the sums it had paid other lines for the use of cars in and out of Minnesota. The additional and final .11 per cent allowance of \$2,753 was, pro tanto, a duplication of one already made.

In the formula adopted below, there is another more serious and pervasive error. Its use of the average percentage for the 21 roads, other than defendant, is erroneous for formulary purposes in this. Only the user's Minnesota proportion of its own mileage is applicable to rentals it pays in order to allocate a proper portion of the latter to Minnesota. But the use of one average Minnesota proportion for all 21 lines makes the multiplier the user's Minnesota mileage in combination with that of all the other lines. Pro tanto, the small Minnesota ratios of the mileage of some lines is applied to the large credit balances due from other lines with a much larger Minnesota mileage. To illustrate: In 1922, the Chicago, Great Western Railway, with a Minnesota mileage of 13.06 per cent of its total, owed defendant a credit balance of \$88.26. For the same year, the Minneapolis, Northfield & Southern Railway, with 100 per cent of its mileage in Minnesota, owed defendant a similar balance of \$1,666.10. All of the latter was earned in Minnesota. But if the Minnesota average rate of local mileage of the two roads (13.06 plus 100), 56.53 per cent, is applied, the credit to this state is cut almost in half. There is a corresponding increase of the portion of the small Chicago, Great Western balance allocable to Minnesota. The illustration shows the fallacy which condemns any method based upon an average rate per centum of Minnesota use by all the other roads.

Moreover, annually some roads are creditors of defendant. It owes them for car rentals to which balances is to

be applied only the user's (its own) Minnesota mileage ratio. But if one average for all lines is taken, an assumed Minnesota use by defendant's creditors is included although they have no such use at all for the year in question. The general average per centum, as used by the court, is a constant factor. Its use ignores the factual lack of relation between it, as the multiplier, and the total figures of all the lines used as the multiplicand. There simply is no basis for allowing the Canadian National Railway's mileage ratio of .01 per cent any potency in reducing the much larger Minnesota ratios of all the other roads. Yet that is what happens if the ratios are independently averaged and the result applied as multiplier to the total credits (of all lines) due defendant. In allocating to Minnesota its proper proportion thereof, the figures for each road must be computed separately—its own balance used as multiplicand, and its own Minnesota proportion, in rate per-centum, as the multiplier.

Using on their total car rental debt to defendant an average Minnesota mileage ratio for all the roads applies a constant arithmetic mean to 21 variants, some of which are extremely so. The arithmetic mean, or average, becomes unrepresentative in proportion to the amount of aberration in its component items. In consequence, when applied as multiplier to any such item, it produces a product out of line with truth in proportion, not only to the variance from the norm of such item, but also deranged by the influence of the similar variance of the other extreme items used in striking the mean.

What we must somehow determine, as nearly as may be, is the amount of money derived from the use of cars in Minnesota. On that question, what has been paid for such use in other states has no bearing. Hence, in any such computation or formula, defendant should not have credit for the whole of its debit balances. It is entitled only to allowances for the portion of such balances properly chargeable to Minnesota. Defendant is taxable only on rentals for the use in Minnesota of its cars. Therefore, of receipts for allocation to Minnesota, no reductions can properly be made of sums it has paid other lines for the use of their cars outside Minnesota. But the decision below

does just that. Having gotten the Minnesota proportion of all defendant's credit balances, the ruling was that there should then be applied in reduction thereof, in order to get at the sum taxable, the whole of defendant's debit balances, rather than only the proportion thereof chargeable for use of cars in Minnesota. The latter can be computed by using on any such balance, as a multiplier, the Minnesota percentage (.11 per cent.) of defendant's mileage. As to its debit balances, defendant was the using line. Hence, the proportion of such use in, and the proportion of the resulting debt chargeable to, Minnesota is equivalent, for the purposes of a formula, to the Minnesota proportion of defendant's mileage.

In this battle of formulae, those already referred to have been eliminated for reasons stated. There is but one other which counsel style the "Burlington Formula." It was not even suggested below until the motion for amended findings or a new trial. The trial judge rightly considered it "a clear attempt on the part of the state to shift its position, from what it assumed in levying the taxes, in its complaint, and maintained throughout the trial." His view was further that the Burlington formula was no part of the record, "and even if it were, there are not sufficient facts and data in evidence to correctly apply it." This last formula, and best of the lot, was not submitted as such during the trial, but, with the exception soon to be noted, the record does disclose, as will later appear, the "facts and data" to which it may be applied, and that with justice.

We are not trying the case anew. But we are reviewing the record and decision below, and, in the latter, to the extent indicated, we find error that prevents an affirmance. Unless we direct judgment, we must order a new trial, or at least enough of one to furnish adequate basis for the application of what, so far as now appears, is the formula which most fully and with the greatest justice meets the need of the case.

Briefly, the Burlington formula proceeds thus: For each of the eight years, defendant's balances, both debit and credit, with each of the other roads, were struck. The Minnesota proportion of each such credit balance was then reckoned by using thereon as a multiplier the Minnesota

per centum of the using line's mileage. The actual figure for each road for each year was so used. The Minnesota proportion of defendant's credit balances so ascertained for each road for each year, the next step was to allocate to Minnesota its portion of defendant's debit balances, which, on the basis of mileage, is .11 per cent of the total. The Minnesota proportions of defendant's debit and credit balances being so computed, the next and simple step was to subtract total debits from total credits and so arrive at the sum taxable in Minnesota for each year.

It is repetition, but probably justifiable in interest of clarity, to say that as to defendant's debit balances it was the using as well as the reporting line. Because Minnesota should not be charged for what defendant paid for the use of cars in other states, but rather and only with what it paid for their use in this state, the ratio of its Minnesota mileage is applied with obvious propriety to its debit balances to ascertain the portion thereof charged for their use in Minnesota and so to be deducted from the credit balances in order to get finally the sum locally taxable.

On the merits of the case arithmetically, nothing more need be said. Belated as was its presentation to the trial court, the Burlington formula comes nearer to reaching with justice and accuracy the desired result than any of the others. It should be adopted and prevail unless the ingenuity of counsel and accountants achieves something better. We would order judgment thereon but for the fact that the defendant should have the opportunity by evidence and argument in the trial court to present its own figures and contentions concerning the application to it of the Burlington formula. All the data for its use are in the record now by way of evidence, except possibly those showing the Minnesota percentage of the using line's mileage. Those figures, except for defendant itself, were not presented by evidence. We apprehend that little or no additional evidence will be needed. Counsel should be able to get with certainty, and agree upon, the one set of figures needed and not appearing in the evidence as it stands. To the extent indicated, and to that extent only, there must be a new trial. The figures furnished by the state in aid of its motion for amended findings or a new trial and in argument here indicate that the total

tax for the eight years, computed on the Burlington formula, will be \$26,414.59. The only objective of the new trial, if one is necessary for that purpose, is to determine the correct amount.

There is argument for defendant that, because long ago it paid the taxes for the years in question as then computed by proper officers of the state (including an additional amount omitted from the first payment and later demanded), the state is now estopped to claim any additional sum. There can be no such estoppel for the simple reason that in the imposition of taxes the state acts in its sovereign rather than its proprietary capacity. *Chicago, St. P., M. & O. Ry. Co. v. Douglas County*, 134 Wis. 197, 114 N. W. 511, 14 L. R. A. (N. S.) 1074; see *State v. Horr*, 165 Minn. 1, 205 N. W. 444. Had the transaction been in the latter category; that is, had the issues arisen from an ordinary business transaction as distinguished from the functioning of the state as a sovereign, it would be, we assume, a fair target for estoppel under the rule of *State v. Horr*, 165 Minn. 1, 205 N. W. 444, and *State v. Gardiner*, 181 Minn. 513, 233 N. W. 16.

There is also argument that because defendant paid the small additional sum omitted from the first payment as above indicated, pursuant to an audit made by representatives of the state, the latter is bound as by an account stated. See *State v. Illinois Cent. R. Co.*, 246 Ill. 188, 92 N. E. 814. Concerning that it is enough to suggest that an account stated as a defense must be specially pleaded. *Board of County Com'rs. of Mower County v. Smith*, 22 Minn. 97. No such defense was pleaded in this case. So we are not required even to consider whether for a tax liability, fixed and imposed by statute, there can be substituted the different obligation of an account stated between officers of the state and a taxpayer.

So far as the decision and judgment below affirm the liability of defendant for the gross earnings tax because of its operation of the involved trackage in Minnesota, they are affirmed. But, for reasons already stated, the judgment in its determination of the amount of the tax is erroneous

and to that extent must be reversed with directions for a new trial of that one issue.

So ordered.

PETERSON, J., took no part in the consideration or decision of the above case.

EXHIBIT "B".

STATE V. ILLINOIS CENT. R. CO.

No. 31216.

Supreme Court of Minnesota.

Oct. 22, 1937 (275 N. W. 854).

Appeal from District Court, Ramsey County; James Michael, Judge.

On petition for rehearing.

Petition denied.

For former opinion, see 274 N. W. 828.

William S. Ervin, Atty. Gen., and Harry W. Oehler, Asst. Atty. Gen. for the State.

Doherty, Rumble, Butler, Sullivan & Mitchell, of St. Paul, and R. C. Beckett and Chas. A. Helsell, both of Chicago, Ill. (V. W. Foster and E. C. Craig, both of Chicago, Ill., of counsel), for respondent.

STONE, Justice.

Defendant's petition for rehearing is denied. But because there must be a new trial to the extent indicated in our decision, which is adhered to, it is proper that we should express ourselves on the following points raised by defendant's petition:

Again we are urged to consider the argument that defendant discharged its full liability to the State by paying the taxes as computed by the Tax Commission and its examiners, long before this suit was brought. Without debate as to its soundness, we allow for the purposes of argument defendant's contention that its answer should be construed as having pleaded the defense of account stated.

With that assumption, the next thing for consideration is the authority of the Minnesota Tax Commission in the determination and collection of gross earnings taxes. Under Section 2239, Mason's Minn. St. 1927, "the public examiner, with the approval of the tax commission" has the "power to prescribe . . . a system of gross earnings accounts . . . provided, that such system shall conform as nearly as practicable with that prescribed for such companies by the United States government."

As matter merely of statutory construction, the proviso conforming the state to the federal system of accounting indicates no intention other than one for regulation of the accounts of those subject to gross earnings taxes. That exclusionary effect but confirms the conclusion, that necessarily would follow in any event, that no power is vested in the public examiner or Tax Commission in any manner to relieve the taxpayer from the fixed obligation to pay the tax imposed by statute.

Absent official power to alter the statutory obligation of the taxpayer, nothing done by the Tax Commission, its examiners or auditors, can create the new obligation of an account stated to qualify that of the taxpayer, or diminish the sum due from it under the law. It is elementary that an account stated creates a new cause of action, independent of the claim or claims which were its original subject matter. *Hanley v. Noyes*, 35 Minn. 174, 28 N. W. 189; *Morse v. Minton*, 101 Iowa 603, 70 N. W. 691; 1 R. C. L. 212.

We have given further consideration to *State v. Illinois Central R. Co.*, 246 Ill. 188, 92 N. E. 814, 833. That case went for the taxpayer upon the ground that, in the exercise of the "full power" conferred upon the Governor, there had been a settlement in the nature of an account stated between him and the taxpayer. The controlling thought was that the issue had already been decided by the chief executive of the State, rather than any inferior officer, in the exercise of the "full power" vested in him by the controlling statute. The presumption was invoked that "where a duty is devolved upon the chief executive of the state, rather than upon an inferior officer, that it is so because his superior judgment, discretion, and sense of responsibility were confided in for

a more accurate, faithful, and discreet performance than could be relied upon if the duty were devolved upon an officer chosen for inferior duties.' "

The present issue is in no such matrix of law and fact. There has been no final determination by the executive department in the exercise of "full power" vested in the Governor of Illinois and controlling in the case just cited. Here no "full power" has been vested in anybody. The only authority is the one noted, to prescribe a system of accounts. Certainly, nothing more need be said to show how plainly the whole question is left for final settlement by the orderly method of adjudication where resort must be had thereto.

What we have said disposes also of the argument that "the tax commission, not this court, has power to prescribe the formula." The Tax Commission has no power, as matter of accounting or otherwise, to collect taxes under a formula which results in the collection of either less or more than under the law and on the facts is found due from the taxpayer. And we pretend to no ultimate formula-making power. We have only the judicial task of applying the law to the facts, and that we have already done in this case to the best of our present ability.

There is argument which need not be summarized that "the tax as sought to be imposed violates" defendant's constitutional rights. In view of the new trial that has been ordered, defendant will have full opportunity to present that argument below, and make such record as may be necessary to insure its proper consideration. Nothing said in our decision will be construed as foreclosing any defense on constitutional grounds. But the main point remains that the amount due will be determined on the so-called Burlington formula unless a better one appears.

Rehearing denied.

PETERSON, J., having been Attorney General and counsel below, took no part in this case.

EXHIBIT "C".**STATE V. ILLINOIS CENT. R. CO.****(two cases)****Nos. 31791, 31910****Supreme Court of Minnesota****Feb. 17, 1939. (284 N. W. 360)****Reargument Denied March 14, 1939.****Appeal from District Court, Ramsey County; Gustavus Loevinger, Judge.**

Action by the State of Minnesota against the Illinois Central Railroad Company for omitted gross earnings taxes. From orders denying the motions of each party for amended findings, or for a new trial, each party appeals.

Orders affirmed.

Doherty, Rumble, Butler, Sullivan & Mitchell, of St. Paul, R. C. Beckett and Chas. A. Helsell, both of Chicago, Ill. (V. W. Foster and E. C. Craig, both of Chicago, Ill., of counsel), for Railroad Company.

J. A. A. Burnquist, Atty. Gen., Wm. S. Ervin, former Atty. Gen., and Harry W. Oehler, former Asst. Atty. Gen., for the State.

Holt, Justice.

On plaintiff's appeal the judgment in its favor for omitted gross earnings taxes for the years 1922 to 1929 inclusive in the amount of \$12,866.50 was reversed. *State v. Illinois Central Railroad Co.*, 200 Minn. 583, 274 N. W. 828, 275 N. W. 854. However, all defenses to a recovery for such omitted taxes were therein determined in favor of plaintiff, and also that the judgment should have been for the sum of \$26,414.59. The case was remitted with direction that defendant be given the opportunity to prove the existence of a better method for ascertaining the correct credit balances for interchange of freight cars than the Burlington formula, and, in case no better one was proven, that defend-

ant could also urge that the application of that formula contravened some provision of the state or federal constitution. The court below, over plaintiff's objection, permitted an amendment of the answer by adding this paragraph: "That a better formula than the so-called 'Burlington Formula,' and the only one permitted under a proper construction of the statutes, is that which the state adopted and promulgated for the years in question, i.e. that which requires the striking of a system balance and the allocation to Minnesota for taxation of a percentage thereof equal to the percentage of the reporting company's line in Minnesota." Upon the limited issues the court was directed to try, it made these findings: "1. That the application of the Burlington formula does not violate the constitutional rights of the defendant. 2. That the track mileage formula, offered by defendant, is not a better formula than the Burlington formula. 3. That under the Burlington formula there became due and owing the plaintiff from the defendant \$26,414.59, (the amount omitted each of the eight years, excluding penalties, is given). 4. That that part of the gross earnings of the defendant, reflected in the net credit balances above set forth, were not included in defendant's semi-annual returns . . . and the same were items of gross earnings not reported. 5. That the Burlington formula was not formally suggested in this particular action until after the first trial, and was then suggested in plaintiff's motion for amended findings or a new trial (November 21, 1935), and the failure to report the freight car per diem earnings for the years 1922 to 1929, inclusive, according to the Burlington formula was not due to the neglect or default of defendant." The conclusion of law was that plaintiff recover \$26,414.59, with interest at six per cent from and after the filing of the findings, and costs and disbursements. Each party moved separately for amended findings or a new trial. From the orders denying the motions each party appeals.

Plaintiff's appeal presents only its right to the penalty and interest prescribed in Mason Minn. St. 1927, sec. 2235. The right to penalty and interest under sec. 2240 cannot well arise for the small error or omission discovered by the public examiner was promptly paid. Chapter 487, Laws

1913, as amended by Ch. 308, L. 1927 (secs. 2233 to 2242, Mason's Minn. St. 1927), and Ch. 9, L. 1912, Ex. sess. as amended by Ch. 533, L. 1919 (secs. 2246 to 2250, Mason Minn. St. 1927), cover the law upon which penalties may be claimed. - Section 2233 relates to reporting, upon forms prescribed by the tax commission, the gross earnings. Section 2237 provides what shall be done where there is a failure to report or default after notice served. There was no such proceeding during any of these eight years or within a reasonable time thereafter. Plaintiff relies on *State v. Chicago, Rock Island & Pac. Ry. Co.*, 181 Minn. 615, 232 N. W. 105, 233 N. W. 866, where penalties were recovered. In that case there was a failure to report certain items of gross earnings, and it was held that the penalty and interest attached when the payment fell due and was not made. Since the enactment of sec. 95 Mason, Minn. St. 1927, the railroad companies could tender payment of part of the gross earnings demanded by the state and thus avoid penalties on such part. As we understand, that is not applicable to the instant case, where proper reports were filed, reports from which the tax was computed that was paid, and from which it could be computed as the court computed it in the first trial, and from which it could be computed under the Burlington formula. There was hence no failure to comply with the bookkeeping and accounts which defendant was required to keep under regulations of the tax commission and supervision of the public examiner. The failure to pay the taxes now found owing was because the statute prescribed no formula for computing the tax from the returns made. It had to be computed according to some formula. It was so computed for the time in question to the knowledge of the state agencies having the enforcement of the gross earnings tax in charge, and no one suspected that a better one could be devised until 1933. - Such being the case the taxpayer should not be subjected to penalties for failure to pay the credit balances derived from the interchange of freight cars with the different railroads operating some part of their transportation system within the state. That penalties are not imposed unless clearly called for by a violation of some statutory duty in respect to the return or payment of the tax is illustrated in *State v. Great Northern Ry.*

Co., 160 Minn. 515, 200 N. W. 834. Although in that case interest accrued on the omitted tax after Ch. 398, sec. 3, L. 1917 (sec. 95 of the code) took effect, the plaintiff could not recover such interest. In this action there were not separable items, but one sum of \$182,751.30 demanded. Only \$26,414.59 was recovered. It would be utterly repugnant to one's sense of justice to penalize defendant when it had paid and the state agencies for each of the eight years in question had accepted certain sums as the credit balances for interchange of cars according to accounts kept and reports made pursuant to statutes. We deem the fifth finding of the court, above quoted, well sustained that the failure to report and pay the credit balances for interchange of cars computed according to the Burlington formula was "not due to the neglect or default of defendant." In the memorandum made part of the findings, the court refers to the fact that there is no statutory liability for interest on a railroad's gross earnings tax, and proceeds thus: "By G. S. 1923, secs. 2235, 2237, and 2240, the gross earnings statutes prescribe what shall constitute a default, what penalties follow a default and what administrative remedial steps shall be taken after a default. Whatever may be the rule elsewhere (see annotation in 96 A. L. R. 925), in this state a taxpayer is not in default if his property is not assessed for taxes without fault on his part, *County (of Redwood) v. M. P. (Winona) & S. T. Land Co.*, 40 Minn. 512, 41 N. W. 465, 42 N. W. 473, or where the tax levied is excessive, *State v. Great Northern Ry. Co.*, 160 Minn. 515, 200 N. W. 834; *State v. Hughes Bros. Timber Co.*, 163 Minn. 4, 203 N. W. 436. There is and can be no claim that the failure to report the freight car per diem earnings for the years 1922 to 1929 inclusive according to the Burlington formula was due to the neglect or default of the defendant. The tax on the freight car earnings demanded by the Minnesota Tax Commission prior to May, 1933, was paid. At all times since May, 1933, the amount demanded has been excessive. The tax computed upon freight car per diem earnings ascertained according to the Burlington formula, unaugmented by unauthorized interest or penalties, has never been certified or otherwise demanded. Hence there never has been a

default and no penalties can be imposed or authorized by the court herein." Plaintiff's appeal must fail.

Defendant assails the Burlington formula as repugnant to state and federal constitutional provisions. If computation of defendant's credit balances from the interchange of freight cars with railroads operating in this state according to the said formula or method reaches accuracy more nearly than any other, all constitutional objections to its use vanish. That such credit balances constitute gross earnings of a railroad has been settled law since 1908. *State v. Minnesota & International Ry. Co.*, 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426; *State v. Great Northern Ry. Co.*, 163 Minn. 88, 203 N. W. 453.

The defenses held not valid on the first appeal do not raise any constitutional question, as we see it, but merely fact issues. By reference to defendant's briefs on that appeal, and on the rehearing, it appears that it was exhaustively argued that, since for more than twenty years prior to 1933, the credit balances for interchange of freight cars between railroad had been reported on prescribed forms and computed according to a uniform system or formula upon which the tax was paid, plaintiff should be estopped to now claim any omitted gross earnings tax for the years in question. That defense was definitely rejected. So also was the one that there had been an account stated for any omission to report and pay credit balances for the years 1922 to 1929, inclusive, when the public examiner upon auditing the returns for said years found an omission of \$119.13, which he reported to the state auditor, who, pursuant to statute drew a draft therefor on defendant, including \$11.91 penalty and \$29.54 interest, total of \$160.58, which was promptly paid to the state treasurer and his receipt obtained July 20, 1931. The duty and powers of the public examiner by virtue of Sec. 3282, 1 Mason Minn. St. 1927, were emphasized in defendant's said briefs and the contention made that there had been an account stated and paid. It is clear that it was not intended to leave either of these two defenses to be either retried or open to the claim that constitutional provisions required either one to be sustained.

The decisive finding of fact, on defendant's appeal, is the one "that the track mileage formula, offered by the defendant, is not a better formula than the Burlington formula." As we read defendant's evidence it does not even tend to prove that the formula it was permitted to plead and prove would more accurately reflect the credit balances on interchanged freight cars than the Burlington formula. It only showed that some seven or eight of the railroads operating large trackage within the state had no credit balances under the Burlington formula. But, as shown in the former opinion, the trackage operated by a railroad within the state does not measure the credit balances from car rentals of its system that may be allocated to its gross earnings tax here. Defendant's evidence does not refute but sustains the court's findings to the effect that its proposed formula is not better than the Burlington formula.

The order on plaintiff's appeal is affirmed and likewise is the order on defendant's appeal.

PETERSON, J., took no part for reasons given in 200 Minn. 583, 274 N. W. 828, 275 N. W. 854.

EXHIBIT "D".

Ramsey County.

No. 32158.

Endorsed: Filed June 16, 1939. Grace Kaercher Davis, Clerk, Minn. Supreme Court.

STATE OF MINNESOTA, *Respondent*,

vs.

ILLINOIS CENTRAL RAILROAD Co., *Appellant*.

Per Curiam.

Defendant appeals from the judgment entered in the court below after the orders denying the motions of both parties for amended findings or a new trial were affirmed. Decision filed February 17, 1939, rehearing denied March 14, 1939, 284 N. W. 360.

The errors assigned and urged on this appeal were presented on the former appeal and the decision therein must be considered final so far as this court is concerned. It having been found that the Burlington formula for computing the tax on freight car per diem earnings was proper, and that the one proposed by defendant "is not a better formula than the Burlington" it follows that the tax computed according to the Burlington formula violates no provision of the constitution of this state, and we are unable to see that the 14th amendment or any other provision of the federal constitution is violated by the judgment rendered.

The judgment is affirmed.

Mr. Justice HILTON and Mr. Justice PETERSON took no part.

(2777)

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1939.

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF APPELLANT.

**DOHERTY, RUMBLE, BUTLER, SULLIVAN,
& MITCHELL,
R. C. BECKETT,
CHAS. A. HELSELL,**

Counsel for Appellant.

**V. W. FOSTER,
E. C. CRAIG,**

Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1939.

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF OF APPELLANT.

Opinions Below.

The first appeal was taken by the State of Minnesota, *State v. Illinois Central Railroad Company*, 200 Minn. 583, 274 N. W. 828. Rehearing denied—275 N. W. 854. Decision on second appeal, by the Illinois Central Railroad Company, 284 N. W. 360. Third appeal, by the company, resulted in judgment against it for \$28,157.95—286 N. W. 359.

Grounds on Which Jurisdiction Is Invoked.

The attack is on the construction and application of the Minnesota gross earnings statute, Sections 2246-2249, Mason's Minnesota Statutes 1927 (Appendix A.)

This court has jurisdiction under Section 237 of the Judicial Code as amended. (28 U. S. C., Section 344 (a).) The decision of the State Supreme Court sustained the statute.

It is contended:

1. To tax freight car per diem credits, where the freight receipts are already taxed, is a denial of the equal protection of the law, is an unreasonable burden on interstate commerce and takes property without due process of law.

2. To construe the statute so as to permit the application of the so-called "Burlington formula" is, when applied to appellant in the circumstances disclosed by the record, so arbitrary, capricious, unreasonable and discriminatory as to be a burden on interstate commerce, denies the equal protection of the law, and takes appellant's property without due process in violation of the Fourteenth Amendment.

3. To retroactively apply the formula in 1935 to transactions in 1922-29 violates the equal protection and due process clauses of the Fourteenth Amendment.

Statement of the Case.

This is an action brought in March, 1934, to recover taxes on alleged gross earnings for the years 1922 to 1929, inclusive. The earnings, which the state claims were omitted from the returns, were alleged car rentals consisting of freight car per diem credits arising from the interchange of freight cars between the Illinois Central Railroad Company and the other railroads operating in Minnesota.

The pertinent provisions of the statutes are:

"2246. *Gross earnings*—Every railroad company owning or operating any line of railroad situated

within or partly within this state, shall, during the year 1913 and annually thereafter, pay into the treasury of the state, in lieu of all taxes, upon all property within this state owned or operated for railway purposes, by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to five per cent of the gross earnings *derived from the operation of such line of railway within this state.*"

"2247. '*Gross earnings*' defined—The term 'the gross earnings derived from the operation of such line of railway within this state,' as used in section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within the state, and a proportion, *based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state.* ('12 c. 9 Sec. 2) (2227.)" (Italics ours.) (Appendix A.)

A Minnesota statute authorizes the Public Examiner to prescribe a formula or system of accounts:

"Section 2239. *Uniform system of accounting*—The public examiner, with the approval of the tax commission, shall have authority and power to prescribe for such companies, joint stock associations, co-partnerships, corporations, or individuals *a system of gross earnings accounts*, that shall be uniform for each class of companies, and he shall supervise the method of keeping such accounts; provided, that such system shall conform as nearly as practicable with that prescribed for such companies by the United States government. ('13 c. 487 Sec. 6 (2219.))" (Appendix B.)

Pursuant to these statutes, the state public examiner (now entitled Comptroller) with the approval of the State Tax Commission did prescribe, prior to the years in question (1922-9), the form which the various railroads were required to use in making their reports of gross earnings, to which the 5 per cent tax should be

applied. This form contained specific rules and instructions for making returns. (Ex. 2, Rec. 76A, offered 26.) The form and the rules and instructions were substantially the same throughout the eight-year period involved in this lawsuit. (R. 61.)

The Illinois Central Railroad Company made its annual reports to the Minnesota Tax Commission on this form and in compliance with the rules and instructions therein contained for each of the years in question. (R. 22, 23, 27, 61.) After these annual reports were made, the state sent auditors to the headquarters of the Illinois Central Railroad Company in Chicago and examined its books and records, and pursuant to such examination made certain claims for additional taxes. (R. 60.) This audit by the state corporate examiners and certification of balance due to the state treasurer was also specifically authorized by statute. (Sec. 3282, Appendix C.) The taxes shown to be due in the original reports together with the additional amounts claimed by the state after auditing the accounts and checking the records were paid in full by the railroad company. (Rec. 27; 60, 61.)

No records are kept of the number of days any car stays in any particular state. The rules of the Interstate Commerce Commission do not require the keeping of such records. The state of Minnesota has never required that such records be kept. Section 20 of the Interstate Commerce Act provides that the railroads shall keep no records except those required under the uniform system of accounting prescribed by the Interstate Commerce Commission. Furthermore it is wholly impracticable to keep such a record.

The instructions of the tax commission provided that such credit balances from hire of equipment should be

apportioned to Minnesota for taxation on the basis of the percentage of revenue freight car miles of the reporting company in Minnesota. The instructions prescribed by the state and followed by the company were (Ex. 2, R. 76A):

"RENTALS FOR USE OF EQUIPMENT IN TRANSPORTATION SERVICE.

'The amount received by the company for its cars employed in transportation in excess of the amount paid out by it for the use of cars of other companies.'

'Where accounts are kept between different companies and charges are adjusted for such service, up to the point where accounts balance, the operation is a mere exchange of the use of the cars, but the amount received by any company for the use of its cars in excess of the amount paid out by it for the use of the cars of other companies is one of its sources of revenue earned by its rolling stock, and should be included in the gross earnings.'

NOTE: You are to report to the State of Minnesota for taxation purposes, (a) the credit balance, if any, on freight equipment used in transportation service and interchanged with foreign roads on the per diem or mileage basis. Minnesota proportion of said credit balance to be computed by applying the percentage that the average revenue freight car mileage in Minnesota bears to the total average revenue freight car mileage of the entire line during the calendar year. (Ex. 2, R. 101.)"

Notwithstanding payment in full of the tax for the years in question (1922 to 1929) pursuant to the formula (Ex. 2, R. 76A) prescribed by state agency acting under legislative authority, (Sec. 2239) and payment of the certified balance after audit by the state's authorized (Sec. 3282) representatives, this suit was brought in 1934 to recover additional taxes computed under a new formula never before heard of. This for-

mula was so fantastic and unworkable that an attempt to explain it would serve but to confuse the issues. It may be ignored since it was abandoned by the state.

The first trial of this case resulted in a judgment for the state against the defendant in the sum of \$12,866.50, on the basis of still another formula devised by the trial court.

The final judgment from which this appeal is taken was based on the so-called "Burlington formula", not pleaded, not prescribed by any agency of the state authorized to act, but which in 1935 was first injected into the case by the assistant attorney general in a motion for a new trial and amended findings of fact. (R. 105.) It arose in the compromise settlement of another lawsuit. (R. 97.) It was never adopted by the state prior to the institution of this suit. (R. 125, 126.)

The Burlington formula is substantially as follows:

Each reporting road is charged with that percentage of the credit balance with each other railroad operating in Minnesota in the account called "rentals from other lines for use of cars" as is determined by ascertaining the ratio of each *using* railroad's Minnesota revenue freight car miles bears to the system car miles of such using road.

Each reporting road is given credit for only such percentage of the debit balance with each other Minnesota railroad in the account called "payments to other lines for use of cars" as is determined by ascertaining the ratio of the *reporting* railroad's revenue freight car miles in Minnesota to its system car miles.

After thus apportioning the amount of credits and debits so computed, the net credits in excess of debits are ascertained and the statutory tax of 5 per cent applied to such net credits. (R. 105, 106.)

For example, Exhibit A (R. 87) shows that during the year 1922 the Illinois Central Railroad Company and the Minneapolis & St. Louis Railroad Company interchanged cars as a result of which there were gross per diem credits in favor of the Illinois Central of \$193,691, partially offset by per diem debits, or rentals in favor of the Minneapolis & St. Louis of \$84,521, making a credit balance in favor of the Illinois Central of \$109,170. 32.42 per cent of the freight car miles of the Minneapolis & St. Louis Railroad during that year were in Minnesota. Under the Burlington formula, it is assumed that 32.42 per cent of the above mentioned credit balance from hire of freight cars accrued in the State of Minnesota, thereby producing as Minnesota proportion of credit balances in the amount of \$35,292.88. Similar credit balances with other railroads were totaled to produce the total "Minnesota Proportion of Credit Balances" of \$95,359. The same exhibit shows that during the year 1922 the Illinois Central interchanged cars with the Great Northern Railway by virtue of which the credits in favor of the Illinois Central amounted to \$101,744, whereas the per diem rentals in favor of the Great Northern were \$149,732, leaving a net balance in favor of the Great Northern of \$47,988. During the year 1922 only eleven-hundredths of one per cent of the total revenue freight car miles of the Illinois Central System accrued in the State of Minnesota, therefore, it is assumed that only eleven-hundredths of one per cent of this debit balance of \$47,988 accrued in Minnesota, thus giving the company credit for an offset of but \$52.79. (Thus while the Illinois Central actually paid \$47,988 to the Great Northern in 1922 for the use of Great Northern cars it, the Illinois Central, under the Burlington formula, was allowed credit for the payment of but \$52.79 and would be taxed on a balance which did not exist, i. e., on \$101,744 less \$52.79 or \$101,691.21!) Similar very small debit bal-

ances or offsets were allowed as to other railroads and these added together produced a total debit balance of but \$237. This amount, under the Burlington formula, is subtracted from the above mentioned total credit balance of \$95,359, leaving net taxable rentals of \$95,122, ~~to~~ which the gross earnings tax of 5 per cent was applied, producing a tax of \$4,756.10.

The trial court overruled motions for amended findings of fact, whereupon an appeal was taken to the Supreme Court of Minnesota by both parties. The decision is reported in *State v. Illinois Central Railroad Company*, 200 Minn. 583, 274 N. W. 828, rehearing denied 275 N. W. 854.

The Supreme Court of Minnesota ignored the pleaded formula, ignored that prescribed by the public examiner and tax commission, ignored that devised by the trial court and remanded the case for the application of the Burlington formula subject to the pleaded constitutional objections, ruling on which was reserved.

The second trial court, pursuant to the decision of the supreme court, found that the additional tax under the Burlington formula amounted to \$26,414.59 and with interest to \$28,157.95. The constitutional objections were overruled.

The decision of the trial court was affirmed on appeals taken by both parties; *State v. Illinois Central*, 284 N. W. 360.

The case was remanded to the trial court for the formal entry of judgment, which was entered and a third appeal was taken by the Illinois Central Railroad Company in order to conclude the proceedings in the state court as a basis for the appeal to this court. The decision on the third appeal is reported in 286 N. W. 359.

The Court said:

"The errors assigned and urged on this appeal

were presented on the former appeal and the decision therein must be considered final so far as this court is concerned. It having been found that the Burlington formula for computing the tax on freight car per diem earnings was proper, and that the one proposed by defendant* 'is not a better formula than the Burlington', it follows that the tax computed according to the Burlington formula violates no provision of the constitution of this state, and we are unable to see that the 14th amendment or any other provision of the federal constitution is violated by the judgment rendered."

Specification of Errors.

The Supreme Court of Minnesota erred:

1. In affirming the judgment against the Illinois Central Railroad Company rendered by the District Court of Ramsey County, State of Minnesota, in the sum of \$28,157.93.

2. In construing the Minnesota gross earnings tax statute (Sections 2246-7, Mason's Minnesota Statutes 1927, page 544) so as to tax system rentals received for the hire of freight cars by one railroad company from another railroad company, thus resulting in double, discriminatory and unequal taxation in violation of the equal protection and due process clauses of the 14th Amendment of the Federal Constitution, and in a burden on interstate commerce in violation of the commerce clause of the Federal Constitution.

3. In construing the Minnesota gross earnings statute so as to permit the imposition of a tax on freight car per diem rentals of appellant's cars while on the lines of other railroads in transit in the course of interstate commerce, thus imposing a tax on personal property in

* Ascertain the system credit balance, if any, with all roads operating in Minnesota and allocate to Minnesota for taxation so much thereof as equals the percentage of the reporting road's loaded freight car miles (or miles of track as the state preferred) in the state. (R. 118.)

transit, which has no taxable situs in the state of Minnesota, thus resulting in an unreasonable burden on interstate commerce and a violation of the due process and equal protection clauses of the 14th Amendment to the Federal Constitution.

4. In construing the Minnesota gross earnings tax statute as though the statute included therein the Burlington formula, although such formula is only a method of estimating freight car rentals and is so inaccurate an approximation in lieu of the real facts that the imposition of the tax based thereon is the taking of appellant's property without due process in violation of the 14th Amendment to the Federal Constitution.

5. In construing the Minnesota gross earnings tax statute as though it included the Burlington formula, although a statute expressly authorized the state public examiner and the tax commission to prescribe a uniform system of accounting and a formula, and the said administrative agencies did prescribe a formula for computing appellant's taxes during all of the years 1922 to 1929, inclusive, which taxes were paid in full long before the Burlington formula was invented.

6. In construing the Minnesota gross earnings tax statute so as to permit the retroactive application of the Burlington formula in 1935 to the gross earnings for the years 1922 to 1929, inclusive, after reports had been made and taxes computed for those years in exact accordance with the rules and requirements of the administrative agencies during those years and without any opportunity on the part of the appellant to obtain and furnish information as to the exact car rentals accruing in Minnesota for that period.

7. In construing the Minnesota gross earnings tax statute so as to permit the application of the Burlington

formula in that its application produces such arbitrary, unreasonable and capricious results as between various railroads similarly situated as to take appellant's property without due process of law and deny appellant the equal protection of the laws guaranteed by the 14th Amendment to the Federal Constitution.

Summary of Argument.

First. The Minnesota gross earnings tax cannot be applied to the freight car per diem rentals since that would result in unequal and double taxation of the same property, a burden on interstate commerce, a denial of the equal protection of the law and the taking of property without due process of law. This is true whether the amount of such rental is determined accurately or estimated in accordance with a formula.

U. S. Express Co. v. Minnesota, 223 U. S. 335.

Cudahy Packing Co. v. Minnesota, 246 U. S. 450.

Railway Express Agency v. Holm, 180 Minn. 268,
239 N. W. 815.

Galveston, etc. R. R. Co. v. Texas, 210 U. S. 217,
227.

Oklahoma v. Wells Fargo & Co., 223 U. S. 298.

State v. St. Paul M. & M. R. R. Co., 30 Minn. 311,
15 N. W. 307.

State v. Northern Pacific Ry. Co., 32 Minn. 294,
20 N. W. 234.

State v. St. Paul Union Depot, 42 Minn. 142, 43
N. W. 840.

Hopkins v. Southern California Telephone Co.,
275 U. S. 393.

State v. M. & I. Railway Co., 106 Minn. 176, 118
N. W. 679, 1007, 16 Ann. Cas. 426.

C. C. C. & St. L. Ry. Co. v. Backus, 154 U. S.
439, 445.

Second. The construction of the statute so as to permit the application of the so-called "Burlington formula" is so discriminatory, capricious and unreasonable as to violate the equal protection, due process and commerce clauses of the Federal Constitution.

Hans Rees' Sons v. North Carolina, 283 U. S. 123, 134, 135.

Southern Ry. Co. v. Kentucky, 274 U. S. 76, 80.

Shaffer v. Carter, 252 U. S. 37, 52, 53, 57.

Oklahoma v. Wells Fargo & Co., 223 U. S. 298.

Hopkins v. Southern California Telephone Co., 275 U. S. 393, 402.

Wallace v. Hines, 253 U. S. 66, 69.

Union Tank Line Co. v. Wright, 249 U. S. 275, 283.

Third. Where the gross earnings tax has been paid strictly in accordance with a formula or system of gross earnings accounts prescribed by an administrative agency of the state acting under legislative authority, and where the accounts were subsequently audited by an agency of the state also acting under legislative authority, and the small additional amount found due was certified to the state auditor and paid to the state treasurer, the imposition of an additional tax pursuant to the retroactive application of a newly invented formula, is so arbitrary and unreasonable as to violate the equal protection and due process clauses of the Fourteenth Amendment.

Section 2239, *Mason's Minnesota Statutes 1927*, page 544.

Section 3282, *Mason's Minnesota Statutes 1927*, page 755.

See also cases under points 2 and 4.

Fourth. The construction of the statute so as to permit the retroactive application in 1935 of a formula under which a part of the freight car per diem rentals in 1922 to 1929 inclusive, are allocated to the State of Minnesota for taxation, exceeds the limit of permissible retroactivity.

Welch v. Henry, 305 U. S. 134, 59 S. Ct. 121.

Nichols v. Coolidge, 274 U. S. 531.

Blodgett v. Holden, 275 U. S. 142.

Untermeyer v. Anderson, 276 U. S. 440.

People v. Graves, 21 N. E. (2d) 371.

State v. Western Union Telephone Company, 111 Minn. 21.

Gray v. City of St. Paul, 105 Minn. 19.

Fifth. A "statute of any state," decision concerning the constitutionality of which may be reviewed on appeal, is not limited to enactments of the State legislature, but includes every act, legislative in character, to which the State gives the force of law, such as an order of a State tax commission, or the decision of a court substituting its choice of a formula for that prescribed by the commission.

King Mfg. Co. v. City Council of Augusta (1928), 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

Live Oak Water Users' Ass'n v. Railroad Commission of State of California (1926), 269 U. S. 354, 46 S. Ct. 149, 70 L. Ed. 305.

Hamilton v. Regents of University of California (1934), 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343.

Lake Erie & Western R. R. Co. v. State Public Commission ex rel. Cameron, 249 U. S. 422-4.

Sultan Ry. Co. v. Dept. of Labor, 277 U. S. 135.

ARGUMENT.

I.

The Supreme Court of Minnesota Erred in Construing the Minnesota Gross Earnings Tax Statute so as to Permit the Application of the Tax to Rentals Received for the Hire of Freight Cars by One Railroad Company from Another Railroad Company, Thus Resulting in Double, Discriminatory and Unequal Taxation in Violation of the Equal Protection and Due Process Clauses of the 14th Amendment and in a Burden on Interstate Commerce in Violation of the Commerce Clause of the Federal Constitution.

This case involves the fundamental question whether the Minnesota gross earnings tax of five per cent can be applied to the rentals received by a railroad company for the hire of freight cars leased to and used by another railroad company in Minnesota.

The state's claim in this case is a tax at the rate of 5 per cent for "rentals from other lines for use of cars", as shown by the plaintiff's motion for amended findings, etc. Exhibit "A" (Rec. 86).

The amount of the said rentals alleged to be taxable in Minnesota is now calculated according to the Burlington formula. Its attempted use in this case is confusing for many reasons, as will be shown, but it cannot obscure the basic question whether the state of Minnesota has the right to apply its five per cent gross earnings tax to rentals alleged to have been received by the Illinois Central Railroad Company from other railroads operating in

the state of Minnesota on account of the use of Illinois Central freight cars on such other railroads in the course of interstate commerce. If such rentals cannot be taxed, it will be unnecessary to consider whether the Burlington formula is a reasonable method of estimating the amount of such rentals nor whether it can be applied in 1935 retroactively to the years 1922 to 1929.

To illustrate, it may be assumed that appellant accepted a carload shipment of freight consigned from Chicago to St. Paul, and had hauled the same along its lines to the interchange point at Albert Lea, Minn., and there delivered it to the M. & St. L. Railroad Company, which hauled it to St. Paul, delivered it to the consignee and returned the car, loaded or empty, to the Illinois Central. Assuming that the Illinois Central car was in the possession of the M. & St. L. for a period of ten days, there would accrue to the Illinois Central interchange per diem credits amounting to \$1.00 per day, or a total of \$10.00. Under the contentions of the state in this suit, the state would be claiming a tax of 5 per cent, or 50 cents, on such alleged car rentals, or per diem credits. Admittedly, the state would have already imposed its 5 per cent tax on the freight charges collected from the shipper or consignee for hauling the shipment, such charges being based on the mileage proportion of the movement in Minnesota. Let us now consider whether the state has the right to collect an additional tax on the alleged car rentals, or per diem credits.

The Minnesota gross earnings method of taxation has been construed to be a property tax.

U. S. Express Co. v. Minnesota, 223 U. S. 335.

Cudahy Packing Co. v. Minnesota, 246 U. S. 450.

Railway Express Agency v. Holm, 180 Minn. 268,
239 N. W. 815.

It is expressly stated in the statute that it is in lieu of all other taxes. Otherwise, it would be a burden on interstate commerce, and therefore unconstitutional.

Galveston, etc. R. R. Co. v. Texas, 210 U. S. 217, 227.

Oklahoma v. Wells Fargo & Co., 223 U. S. 298.

Since it is a property tax, it is necessarily a tax on all the property used to produce the earnings, regardless of the ownership of such property. Such property would include cars, railroad tracks, depots, and all other railroad property, whether owned or leased. If the tax be applied to the rentals received by the owner as well as the earnings received by the lessee for the use of the property, there is double taxation.

This has been clearly held by the Minnesota Supreme Court in *State v. St. Paul M. & M. Railroad Company*, 30 Minn. 311, 15 N. W. 307. In that case the Minnesota Supreme Court condemned an attempt by the state to include a \$40,000.00 annual track rental received by the St. Paul M. & M. Railway Company from the Northern Pacific Railway Company for the use of the former's track. The Court was careful to point out that the state was limited to gross income derived from operations and the Northern Pacific Railway was the company which actually operated the rented line and that, since the state had already included the income derived by the Northern Pacific from the operation of this rented line, it would be double taxation to include the rental paid the owning company. A portion of the opinion follows:

"* * * Rent or compensation paid to the company for the right to operate the railroad cannot be called receipts on account of the operation of it. The company might not operate its railroad at all, but lease it for a gross sum, in which case all the receipts on account of the operation of the railroad

would go into the hands of the lessee, and the rent only (which would probably be regulated by the expectancy of net earnings) into the hands of the company. And in such case exacting 3 per centum upon the rent paid the company and also upon the receipts by the tenant earned by operating the railroad, would be, to the extent of the rent, in the nature of double taxation, or rather of exacting twice the commutation for taxes on the same property. Leasing or selling the railroad cannot affect the rights of the state. Into whose hands soever the railroad may pass, and whoever may receive the gross earnings, the obligation to pay and the right to receive the 3 per centum on such gross earnings are unimpaired. Such earnings still furnish the measure of such obligation and right."

In *State v. Northern Pacific Railway Company*, 32 Minn. 294, 20 N. W. 234, the principle announced in the foregoing case was again approved and applied—the Court saying:

"In *State v. St. Paul M & M Ry. Co.*, 30 Minn. 311, S. C. 15 N. W. Rep. 307, the term 'gross earnings,' in the foregoing quotation, was held to include, not rents received for the right to operate the railroads, but only sums earned by operation, and that leasing or selling the railroad cannot affect the rights of the state; and into whosoever hands it may pass, and whoever may receive the gross earnings, the obligation to pay, and the right of the state to receive the 3 per centum on such gross earnings are unimpaired, and they still furnish the measure of such obligation and right."

In *State v. St. Paul Union Depot*, 42 Minn. 142, 43 N. W. 840, it was held the income derived by the St. Paul Union Depot Co. on account of terminal passenger services performed by that company need not be returned as gross income for the purposes of taxation because the passenger transportation charges of the railroad companies using the depot included the depot company's services. The court pointed out that since the passenger transportation

charges included the cost of using the St. Paul Union Depot it would be double taxation if the rentals received by the Depot Company were taxed as well as the transportation income received by the using lines.

A portion of the opinion follows:

"* * * if a passenger on one of these roads pays his fare from Chicago to St. Paul, this covers the entire transit between the two cities, including the accommodations of the Union Depot. Hence, for all the facilities furnished by the defendant to the railroad companies, and for which it charges them their respective shares of the cost, the railway companies charge their patrons as part of their service, and the whole goes into and forms a part of their gross earnings, upon which they pay to the state as taxes a certain percentage. All of the railway companies who use this Union Depot pay to the state, either under the provisions of their special charters, or under the act of March 10, 1873, a percentage on their gross earnings in lieu of taxes on all property held and used by them for railway purposes.

"It is evident from this statement of facts that the sole and only function performed by the defendant corporation is to furnish, at cost, a union depot and terminal facilities for the common use of these different railway companies, and that the scheme of forming a corporation for that purpose, and issuing stock, is but a more convenient and economical method of holding the property and managing the business than it would be to hold and manage it as tenants in common. It is also apparent that what is charged the railway companies and received by the depot company for these terminal facilities is nothing more or less than a part of the expenses of the former in transacting their railway business, and that what are called the 'earnings' of the depot company are for services for which the railway companies charge their patrons, and are all included in the gross earnings of the companies, on which they pay a percentage to the state. To collect a percentage on these gross earnings, and also a percentage on the gross earnings of the depot company, would be, *pro tanto*, double taxation of the same thing."

When the Gross Earnings of Leased Property Have Been Taxed, Such Property Cannot Again Be Taxed.

In *Hopkins v. Southern California Telephone Company*, 275 U. S. 393, the United States Supreme Court had under consideration the gross earnings tax law of California applicable to telephone companies, which, as to its basic principles and in its material provisions, was substantially the same as the gross earnings tax laws of Minnesota now under discussion. The Southern California Telephone Company was an operating company and paid the gross earnings tax prescribed by law as being in lieu of all other taxes on its property. It owned the telephone system except that among the various items of property devoted to the operation thereof, it had under lease from the American Telephone & Telegraph Company the usual telephone instruments or talking sets consisting of the receiver, transmitter and induction coil. The taxing authorities attempted to tax the telephone instruments so leased on the theory that being the property of the American Telephone & Telegraph Company, and not that of the operating company which paid the gross earnings tax, they were taxable as the property of the American Telephone & Telegraph Company under the laws applicable to taxation of tangible personal property generally. The position of the state taxing authorities was that since the gross earnings tax was a commuted tax on the property of the Southern California Telephone Company it was not in lieu of taxes upon leased property belonging to another company not paying such a gross earnings tax. The position of the Telephone Company was that all the property, *both owned and leased*, was what had produced the earnings, and hence that the commuted tax was on property which included that which was leased as well as that which was owned. The United States Supreme Court,

after pointing out that the operating company had not deducted from gross earnings the rental paid for the talking sets, showed the inequality that would result if the State were allowed to tax the sets, and held that to avoid "very serious questions under the Federal Constitution" the statute must be construed as not subjecting the leased sets to local taxation. In so doing the Court said (p. 402):

"The state received from respondents a sum equal to five and one-half per centum of the gross revenues derived from all operating property under their control-leased as well as owned. These did not depend upon ownership; and rent paid out was not considered.

"If payment of the prescribed part of the gross receipts only relieves from local taxation property actually owned and leaves all held under lease subject thereto, inequalities with possible confiscation, would certainly result. Under that theory a corporation with title to half (in value) of its operative property, the remainder being leased, would really pay on account of the portion owned at twice the rate required of another corporation operating the same amount of property and having equal receipts, but holding nothing by lease. And if the ratio between property owned and leased were less, the difference in rate would be still greater. A telephone company which leased everything it used would release no property from taxation by paying the gross receipts tax, while the competitor with equal receipts, by paying the same amount, might absolve from local assessment property of very large value.

"These difficulties cannot be avoided by saying the lessee will not pay assessments against the lessor and therefore cannot complain. Leases are commonly made with reference to taxation. When the lessor discharges the tax the lessee pays rent accordingly. And the Fourteenth Amendment protects those within the same class against unequal taxation; all are entitled to like treatment.

"Here respondents have surrendered out of gross receipts the equivalent of the burden imposed upon other property not less valuable than all the operating property in their systems; and now, unless more is paid, disruption is threatened through seizure and sale

of essential instrumentalities actually employed to produce those receipts.

"We think the purpose of the 1910 amendment is to tax all operating property of a telephone company by ascertaining the gross receipts, and taking therefrom the specified percentage. Thus, the imposition becomes approximately equal to what other property bears. Unless the gross receipts tax be so treated, some very serious questions under the federal constitution are almost certain to arise. Without an authoritative holding by the State Supreme Court to the contrary, we must conclude the leased speaking sets are not subject to local taxation."

Hopkins v. Southern California Telephone Company was cited with approval by the Supreme Court of Minnesota in *Railway Express Agency v. Holm*, 180 Minn. 268, 239 N. W. 815.

The Court said:

"Our conception of the gross earnings tax is that it is aimed at the business to which it is applicable considered as a whole and embracing all property used therein (citing cases), and also that the gross earnings tax is inconsistent with any other form of taxation (citing *Hopkins v. So. California Telephone Company*, 275 U. S. 393), and that unity of purpose is the foundation for the imposition of such commuted tax; that plaintiff's motor vehicles are used exclusively in its business; that the gross earnings tax is necessarily a tax upon such motor vehicles and the imposition of the motor registration tax would subject the motor vehicles to two taxes."

Strange as it may seem, the state courts in their opinions in the present case have ignored the fact that their ruling herein conflicts with the cited earlier decisions. Yet, it seems clear that while said decisions for the most part involve rentals from real estate or tracks owned by one railroad and used by another, there is not the slightest reason for making a distinction between rentals received for freight cars owned by one railroad company and used by another railroad company in Minnesota, and rentals of real estate or tracks similarly leased.

First Attempt to Apply Gross Earnings Tax to Car Interchange Per Diem Credits.

The first attempt of the State administrative authorities to apply the gross earnings tax to car rentals received by a railroad company for the use of its cars by another railroad company in Minnesota was that involved in the case of *State v. M. & I. Railway Co.*, 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426, decided November 27, 1908. That case involved a consideration of the application of the Minnesota railroad gross earnings tax to the item "Hire of Equipment, Credit Balance": as reported by the railroad company to the Interstate Commerce Commission under the uniform system of accounting prescribed by the Interstate Commerce Commission. Under that system of accounting the net result of the interchange of cars by any railroad company with all other railroad companies is thrown into one account and the net result is shown as a credit balance or a debit balance. The ruling of the State Supreme Court upon this point was as follows:

"Upon this question we accept the views of the Supreme Court of Wisconsin in the case of *State ex rel. Abbot v. McFetridge*, *supra*. Where accounts are kept between different companies and charges are adjusted for such service, up to the point where the accounts balance, the operation is a mere exchange of the use of the cars, but the amount received by any company for the use of its cars in excess of the amount paid out by it for the use of the cars of other companies is one of its sources of revenue earned by its rolling stock, and should be included in the gross earnings."

Beginning in 1908, the tax administrative authorities of the state of Minnesota promulgated their ruling (which was faithfully complied with by appellant in the present case), that a balance should first be made between the reporting railroad on the one hand and all other railroads on the other, and where such balances resulted in a net credit from the interchange of freight cars a proportion of such net credit equal to the proportion of the *reporting* road's mileage in the state should be taxable in Minnesota. The ruling promulgated in 1908 and in force all through the period 1922 to 1929 was that the Minnesota gross earnings tax would be applied to a proportion of such net credit balances based on the *reporting* railroad's freight car mileage in Minnesota as compared to the *reporting* railroad's total freight car miles. Under this ruling, appellant reported and paid the taxes on approximately one-tenth of one per cent of its hire of equipment credit balances.

While the appellant acquiesced in said ruling by the state tax commission and reported its hire of equipment credit balances, to Minnesota and paid the five per cent tax on the Minnesota proportion thereof, such reports and payments were made only because such taxes computed under the formula promulgated in 1908 were so small as to be negligible. The appellant had credit balances for its hire of equipment in only one year out of the eight here involved, and such balances were small and the proportion thereof reported to Minnesota on which taxes were paid was based on the appellant's own mileage within the state of Minnesota, which was approximately one-tenth of one per cent of its total mileage.

Appellant denies that the gross earnings tax should be applied to any of the freight car per diem credits.

regardless of the formula used in computing the amount supposed to be taxable in Minnesota.

It is a usual and necessary incident of the railroad business that freight cars be interchanged freely between railroads in accordance with the requirements of freight traffic. Section 1 of the Interstate Commerce Act gives the Interstate Commerce Commission jurisdiction over car service, including the requirement that freight cars be interchanged. These requirements are such that a large proportion of each railroad's rolling stock is usually in the possession of other railroads. The lines of movement followed by its cars are not subject to its own control. Even in times of great car shortage no railroad has the right to haul a carload shipment to the end of its own line and there unload it and keep its cars. If such shipment is consigned to a point beyond its own lines the law requires the car to follow the shipment wherever it may go. The movements of traffic are such that there may habitually be large credits in favor of the Illinois Central Railroad from some one connecting carrier and there may be similarly large debits growing out of car interchanges with another carrier. These things are beyond the control of any carrier. The net result of all such interchanges is shown in the accounts as reported to the Interstate Commerce Commission under the heading "Hire of Equipment, Credit Balance" or "Hire of Equipment, Debit Balance".

It is obviously a burden on interstate commerce for a state to impose on a railroad company a tax of five per cent of the gross receipts from the interchange of freight cars in interstate commerce, unless such exaction can be justified in some reasonable and logical way as a part of the concept of the gross income tax as a tax on the property used to produce the income.

When a railroad company has leased its cars to another railroad company, the lessee enjoys all of the beneficial rights of ownership during the term of the lease and when the lessee has paid the tax on the gross receipts earned, the cars have been fully taxed and there is no logical basis for applying an additional tax.

Each state in which the Illinois Central operates has the same right to take its net railway operating income into consideration as a basis of determining the value of the entire railroad system, and then to allocate to itself such proportion as may be reasonable, taking into consideration miles of track and other recognized bases of allocation.

Therefore, it may not be improper for the state of Minnesota to apply its gross earnings tax to the hire of equipment credit balances, (where there are such balances) as determined under the rules of the Interstate Commerce Commission, which require that such balances shall be determined by taking all railroads into the balancing process; and then to allocate as the Minnesota proportion of such credit balances only a percentage *based on appellant's own mileage within the state*. While we do not believe that the gross earnings tax should be applied to rentals resulting from the interchange of freight cars, under any formula, we do not object to the payment of a tax based on hire of equipment credit balances, if such balances be computed by taking all railroads into the balancing process, as required under the rules of the Interstate Commerce Commission and if such balances are prorated on the basis of appellant's own line of railway or own revenue car miles since there is some basis for claiming that such a tax has some reasonable relationship to the value of appellant's business property used by it in the state.

But here the state of Minnesota attempts to apply its gross earnings tax to an amount produced by a formula which has the effect of creating a totally non-existent element of value by taking into consideration only credit balances between the Illinois Central and not all but certain other individual lines of railroad and allocating to Minnesota a proportion thereof *based on the operations of the using instead of the reporting railroad.*

Hire of equipment credit balances, are customarily a negligible part of the earnings of the Illinois Central System, as shown by its income account for each of the years in question (R. 76A) and therefore constitute a negligible element in determining the value of its property for purposes of taxation. Nevertheless the Burlington formula would produce an additional tax of over \$3,000 per annum, although the five per cent tax when applied to all of the earnings of the Illinois Central's own business and operations in Minnesota produces a tax of but \$4,000 per annum.

Treating, as might be done, hire of equipment credit balances as an element of value of the entire Illinois Central System distributable in proportion to the freight car mileage of the company in each state, is quite different from the treatment of such credit balances with each other railroad separately as income, taxable in the states in which such income is allegedly earned. This distinction is fundamental in the concept of the gross income tax using gross income as a method of valuing and taxing the property used to produce the income, in lieu of all other taxes, as compared with a true income tax. A true income tax may be applied to income no matter how many persons may receive the same income in succession. But when income is used as a basis of

valuing property the same income cannot be taxed again, nor can the property be again taxed, either through direct assessment as in the *Hopkins v. Southern California Telephone Company*, *supra*, nor by taxing rentals received by the owner, which would amount to a duplicate valuation of the same property, condemned in *State v. St. Paul M. & M. R. Co.*, 30 Minn. 311, 15 N. W. 307, and in *State v. St. Paul Union Depot Co.*, 42 Minn. 142, 43 N. W. 840. The Illinois Central movements are virtually all interstate as is shown by the maps and oral testimony. If it is income at all it is system income. If any portion of it be used as the measure of the railroad's value in a state, the amount allocated must bear a direct relationship to the proportion of its system property in the state, not the proportion of some other railroad in the state.

The use of the Burlington or any other formula cannot obscure the fundamental fact that this is an attempt to apply the gross earnings tax to rentals of property received by the owner after the gross earnings tax has been applied to the earnings produced by the use of the property. Take, for example, the detailed statement of the method of arriving at the amount of the judgment in this case by the application of the Burlington formula, as shown by Exhibit "A" to the Plaintiff's Motion for Amended Findings. (R. 86-94.) This statement (R. 87) shows that the Illinois Central interchanged freight cars with 21 other railroads in the State of Minnesota during the year 1922. Among others was the Duluth & North Eastern Railroad, as to which the column headed "Rentals from other lines for use of cars" shows a gross rental in favor of the Illinois Central of \$109.00, without any offset. Similarly, the Minnesota, Dakota & Western Railway and

the Minnesota Western Railroad had per diem rentals in favor of the Illinois Central without any offsets. All three of these railroads are wholly in Minnesota, so the five per cent gross income tax was applied to the entire car rentals accruing to the Illinois Central from these roads. In other cases, there were rentals chargeable both for and against the Illinois Central as, for example, in the case of the Chicago, Milwaukee, St. Paul & Pacific, as to which the credits in favor of the Illinois Central were \$605,814 and the charges by that railroad against the Illinois Central were \$322,272, resulting in a credit balance from hire of freight cars in favor of the Illinois Central of \$283,541.52. 11.82 per cent of the Milwaukee Road is in Minnesota, so it was assumed that 11.82 per cent of the above car rentals were earned in Minnesota, with the result that the five per cent tax was applied to the Minnesota proportion of said rentals amounting to \$33,514. All of the other items are similar to these. Thus the gross earnings tax is applied to car rentals whether there is any offset or not, and where an offset is allowed it is but the negligible percentage of eleven hundredths of one per cent.

There has been no attempt to apply this gross earnings tax to cars used by railroads in Minnesota owned by other railroads which have no tracks in Minnesota such as, for example, the cars of the Pennsylvania Railroad Co., the New York Central Railroad Co., and the Atchison, Topeka & Santa Fe Railway Company, although such cars, in the course of the vast interchange of freight cars among railroads all over the United States, frequently move within the State of Minnesota. Such cars while in transit across the state are properly taxable as property used in the state under the gross earnings tax applied to the using companies, but they cannot legally again be taxed in Minnesota against their owners by the gross earnings tax method

any more than they could be taxed by the ordinary ad valorem tax method, since such cars constitute, with relation to their owners, personal property *in transitu* and as such are exempted from local taxation. (See *Commonwealth v. Union Pacific Railroad Company*, 214 Kentucky 339, 283 S. W. 119, and proceedings of 31st Conference of National Tax Association, 1938, pages 166 to 173.)

There is no legal difference between the taxable situation of the cars of the Illinois Central Railroad Company operated on the lines of other railroads in Minnesota and the situation of cars of other railroad companies similarly interchanged and used in Minnesota when such other railroad companies have no tracks in the state. In other words, the mere fact that the Illinois Central operates about thirty miles of tracks in the State of Minnesota cannot logically change the taxable position of Illinois Central cars interchanged with, and used by, other railroads which have tracks in that state. Such a tax on car rentals cannot justly be used as an additional tax on the cars themselves which have already been taxed as part of the property which is the basis of the gross earnings tax applied to the using railroads, nor can it justly or logically be used as a basis for increasing the tax on the thirty miles of rail operated by the Illinois Central in that state. It is just as illegal to use these rentals as a basis for increasing the tax on property which is otherwise taxable as it is to use the tax as a means of double taxation on the cars themselves. A legal tax cannot be increased by an illegal measure based on something not taxable. *McCallen v. Massachusetts*, 279 U. S. 670; *Hopkins v. Southern Cal. Telephone Co.*, 275 U. S. 393.

Subterfuges which have the effect of taxing interstate commerce are illegal, however devious or complicated the

evasive process may be. *Cooney v. Mountain States T. & T. Co.*, 294 U. S. 384.

To use the small mileage of the Illinois Central System in Minnesota as an excuse for taxing freight car per diem rentals which do not accrue on the thirty miles of its road in the state would be, in the language of the U. S. Supreme Court, *Wallace v. Hines*, 253 U. S. 66 "to expose the heel of the system to a mortal dart."

Burlington Formula Conflicts with Statute.

Another reason why freight car per diem credits are not taxable in any amount is that under the specific provisions of the statute itself they are not "*gross earnings derived from the operation of such line of railway within this state.*" The words of the statute "line of railway within this state" are not ambiguous and can have but one meaning. They cannot be distorted to mean that a tax against the reporting road can be based upon the operation, not on the reporting line but on other lines. It is obvious that the extent of the operation of the other lines is used, rather than the operation on appellant's line, for the reason that the other lines have a much larger percentage of their revenue freight car mileage in the state, thus producing a larger tax. But the very words of the statute limit the tax to earnings or transactions arising on the line of railway of the reporting company. If it did not, the state could tax freight car per diem rentals accruing to roads having no tracks in Minnesota, condemned in *State v. Great Northern Railway Company*, 163 Minn. 82-92. The Supreme Court of Minnesota there held that credit balances with railroads having no railroad in the state could not be taxed, although the cars were used and the rentals accrued in Minnesota. It follows, for the same reason, that credit balances, real or imaginary, accruing on some line other than that of the reporting road cannot be taxed where, as here, there is no appropriate or rational relationship between them and the value of the taxable property in the state.

II.

The Construction of the Statute so as to Permit the Application of the So-called Burlington Formula Is so Discriminatory, Capricious and Unreasonable as to Violate the Equal Protection, Due Process and Commerce Clauses of the Federal Constitution.

If it be decided that freight car per diem credits may be taxed notwithstanding (a) the income from the same cars is already taxed against the using line, thus resulting in unequal and double taxation, (b) the income is not derived from the operation of the reporting line as required by the specific provision of the statute itself, then it is necessary to determine whether the application of the Burlington formula, as applied to this particular railroad company, can be justified.

This court said in *Norfolk & Western Ry. Co. v. State of North Carolina*, 297 U. S. 682-685:

"A formula not arbitrary on its face or in its general operation may be unworkable or unfair when applied to a particular railway in particular conditions."

In *Hans Rees' Sons v. North Carolina*, 283 U. S. 123, the State of North Carolina imposed a tax on the income of a New York Corporation. Under the North Carolina statute there was allocated for taxation that part of the net income which bore the same ratio to the entire net income as the value of the tangible property within the state bore to the value of all of the company's tangible property. This court held that such an application of the statute produced an unconstitutional result since the part of the income thus attributed to the state was out of all appropriate proportion to the business transacted by the corporation in the state.

The court said, page 134:

"When, as in this case, there are different taxing jurisdictions, each competent to lay a tax with respect to what lies within, and is done within, its own borders, and the question is necessarily one of apportionment, evidence may always be received which tends to show that a State has applied a method, which, albeit fair on its face, operates so as to reach profits which are in no just sense attributable to transactions within its jurisdiction."

And page 135:

"For the present purpose, in determining the validity of the statutory method as applied to the appellant, it is not necessary to review the evidence in detail, or to determine as a matter of fact the precise part of the income which should be regarded as attributable to the business conducted in North Carolina. It is sufficient to say that, in any aspect of the evidence, and upon the assumption made by the state court with respect to the facts shown, the statutory method, as applied to the appellant's business for the years in question operated unreasonably and arbitrarily, in attributing to North Carolina a percentage of income out of all appropriate proportion to the business transacted by the appellant in that State. In this view the taxes as laid were beyond the State's authority. *Shaffer v. Carter*, 252 U. S. 37, 52, 53, 57."

The Supreme Court of Minnesota, as has been pointed out, has repeatedly held that the gross earnings tax is a property tax in lieu of all other taxes. The statute specifically so provides. Any formula used as the basis for allocating a portion of interstate earnings must, therefore, bear a reasonable and direct relationship to the amount of the taxpayer's property in the state of Minnesota.

What are the facts? Passing for later discussion, the admitted fact that appellant paid the amount of this tax for the years in question in accordance with the formula prescribed by the state agency authorized by the legislature to act (Rec. 27 and 61; Ex. 2, Rec. 76a), and passing

for the present the admitted fact that the Burlington formula, which the state now attempts to use, has never been adopted nor prescribed by a public examiner, a comptroller or a tax commission of the state of Minnesota or any other agency of the state having authority to act (Rec. 126, 132), and passing by the admitted fact that the formula was not pleaded, but was first suggested to the court as the result of the compromise of another lawsuit in a motion for a new trial (Rec. 97, 105), let us consider what the record shows concerning the application of the Burlington formula.

The amount of tax produced by the Burlington formula for the years 1922-29, inclusive, is shown by the following table (Sup. Rec):

Name of Road	Total Mileage	Miles in Minnesota	Claimed Under Burlington Formula
Big Fork & International Falls Railway Co.	33.67	33.67	None
Big Fork & Northern Ry. Co.	31.60	31.60	None
Canadian Northern Railway Co.	No report		\$ 7,722.78
Chicago & Northwestern Railway Co.	8,328.86	650.30	17,744.41
Chicago, Burlington & Quincy Railroad Co.	9,070.14	23.61	18,796.94
Chicago Great Western Railroad Co.	1,410.13	400.74	None
Chicago, Milwaukee & St. Paul Railway Co.	10,566.32	1,220.37	None
Chicago, Rock Island & Pacific Railway Co.	7,201.80	234.24	35.83
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	1,676.81	431.69	None
Dubuque & Sioux City Railway Co.	(Operated by Ill. Cent.)		
Duluth & Iron Range Railroad Co.	277.15	277.15	None
Duluth & Northeastern Railroad Co.	61.75	61.75	None
Duluth & Northern Minnesota Railway Co.	100.80	100.80	None
Duluth, Missabe & Northern Railway Co.	395.90	385.41	None
Duluth, Rainy Lake & Winnipeg Ry. Co.	(Operated by D. W. & P.)		
Duluth, South Shore & Atlantic Ry. Co.	562.10	—	108.96
Duluth Terminal Railway Co.	—	—	None
Duluth Union Depot & Transfer Co.	—	—	None
Duluth, Winipeg & Pacific Railway Co.	169.00	169.00	None
Electric Short Line Railway Co.	54.40	54.40	None
Electric Short Line Terminal Co.	—	—	(?)
Great Northern Railway Co.	7,779.94	2,103.40	
Green Bay & Western Railway Co.	228.57	—	\$ 294.44
Hill City Railway Co.	20.09	20.09	None
Illinois Central Railroad Co.	4,573.78	30.15	26,414.59
Mason City & Fort Dodge Railway Co.	(Included in C. G. W.)		None
Minneapolis & Rainy River Railway Co.	62.67	62.67	None
Minneapolis & St. Louis Railroad Co.	1,537.68	376.99	None
Minneapolis Eastern Railway Co.	—	—	None
Minneapolis, Northfield & Southern Ry. Co.	68.64	68.64	None
Minneapolis, Red Lake & Manitoba Ry. Co.	33.50	33.50	None
Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.	4,307.04	1,037.78	None
Minneapolis Western Railway Co.	—	—	None
Minnesota & International Railway Co.	178.66	178.66	None
Minnesota & Manitoba Railway Co.	43.70	43.70	None
Minnesota, Dakota & Western Railway Co.	17.87	17.87	None
Minnesota Transfer Railway Co.	—	—	None
Northern Pacific Railway Co.	6,399.33	973.07	(?)
Railway Transfer Company of Minneapolis	—	—	None
St. Paul Bridge & Terminal Railway Co.	—	—	None
St. Paul Union Depot Co.	—	—	None
Spirit Lake Transfer Co.	—	—	None
Winona Bridge Railway Co.	—	—	None
Wisconsin Central Railway Co.	(Operated by Soo Line)		None

These same facts are shown by the testimony of the state employees, corporate examiner Bergstrom and secretary of the tax commission Nelson (Rec. 144, 152, 154, 165, 170). Although the witnesses were so evasive the court had to admonish them (Rec. 132, 154, 156, 158, 159).

The foregoing table discloses that if the Burlington formula had been prescribed as required by statute by the public examiner with the approval of the state tax commission for the years 1922 to 1929 inclusive, of the forty-four railroads shown in the state, the formula would have produced a tax against but seven other lines. The Chicago, Great Western with 400 miles of road in the state would have paid no tax during these eight years. The Milwaukee with 1,220 miles would have paid no tax. The Omaha with 431 miles would have paid no tax. The Duluth & Iron Range with 277 miles, none. The Duluth, Missabe & Northern, 385 miles, none. The Minneapolis, St. Paul & Sault Ste. Marie 1,037 miles, none, to mention only some of the more important roads which had several times as much mileage in the state as the thirty miles owned by the Dubuque & Sioux City Railway Company which is operated by the Illinois Central.

Not only, as shown by the foregoing table, does the Burlington formula produce no tax against most of the railroads in the State of Minnesota for the years 1922 to 1929 inclusive, but as is shown by the following table but seven other roads made any return of such income for the years 1935 and 1936, the only years for which returns were available at the time of trial:

Per Diem Returns 1935-6

	1935	1936
Canadian Northern	\$ 9,246.26	\$ 22,585.03
Chicago Great Western	None	None
Chicago, Burlington & Quincy	14,676.40	29,254.59
Chicago, Milwaukee, St. Paul & Pac.	None	None
Chicago & Northwestern	14,678.43	43,772.21
Chicago, Rock Island & Pacific	4,505.05	10,982.74
Chicago, St. Paul, Minneapolis & Omaha	None	None
Duluth, Missabe & Northern	32,183.66	None
Duluth & Northeastern	None	None
Duluth, South Shore & Atlantic	None	None
Duluth, Winnipeg & Pacific	None	None
Great Northern	None	48,581.51
Green Bay & Western	1,169.60	48.89
Minneapolis, Anoka & Cuy. Range	None	None
Minneapolis & St. Louis	None	None
Minneapolis, St. Paul & Sault Ste. Marie	None	None
Minneapolis, Northfield & Southern	None	None
Minnesota, Dakota & Western	None	None
Minnesota Western	None	None
Minnesota, Red Lake & Manitoba	None	None
Minnesota Transfer	None	None
Minnesota & International	None	None
Northern Pacific	111,323.26	13,415.87—1st 6 mos. 161,085.96—2nd 6 mos.
Illinois Central (in litigation)	—	—
Railway Transfer Co.	None	None
Minnesota Northern Elec.	None	None
Wisconsin Central (M. St. P. & S. S. M.)	None	None

That there actually is no relationship between the amount of railroad property of any company in the State of Minnesota and the amount of the tax produced by the Burlington formula is conclusively shown by the testimony of Mr. Bergstrom (Rec. 151), Corporate Examiner of the State of Minnesota in the Comptroller's office (Rec. 139.) The record discloses that Mr. Bergstrom not only was an official corporate examiner of the state, being one of those who audited the accounts of the Illinois Central Railroad Company for the years in question who certified to the State Auditor the amount of a small balance which was paid (Rec. 60), but that he was also the tax expert for the state who had charge of this litigation (Rec. 20-21). He testified in response to the question:

"Q. Disregarding for the purpose of this question the rolling stock, it is true, is it not, Mr. Bergstrom,

that there is no relation between the amount of the tax produced by the 'Burlington' formula and the amount of other railroad property any company may have in the State?

A. That is true." (Rec. 151.)

In response to the question:

"Q. Are you the Bergstrom who was referred to by Mr. Boyle, Chairman of the Tax Commission, as the man who handles these railroad tax matters?

A. Yes, sir."

This testimony of itself condemns the formula. The statute provides, and the Supreme Court of Minnesota has construed it to mean, that the tax is a property tax "in lieu of all of the taxes upon all property in this state" (Sec. 2246, Appendix A). That it is a property tax is held in *United States Express Company v. Minnesota*, 223 U. S. 335; *Cudahy Packing Company v. Minnesota*, 246 U. S. 450; *Railway Express Agency v. Holm*, 180 Minn. 268, 239 N. W. 815. If, as must be conceded, it is a property tax and if the state admits, as it unqualifiedly does, by this testimony, that there is no relation between the amount of the tax produced by the formula and the amount of the taxable property in the state, there can be no conceivable defense to its application.

The lack of relationship between the amount of business done by a railroad and the amount of the tax computed under the Burlington formula is again definitely shown by the testimony of Corporate Examiner Bergstrom. (R. 149):

"Q. Might it not be true under the 'Burlington' formula two roads with exactly the same number of debits and credits for the particular reporting period under their freight car per diem accounting would, because of the respective mileage of the two roads, produce a result where one would have a tax to pay and the other would not?

A. That is true."

And again the witness testified (R. 150): It is a fact that the Milwaukee Railroad with its thirteen hundred miles of road does a great deal more business in the state than the Illinois Central Railroad with its thirty miles of track. The Burlington formula produces no tax against the Milwaukee for the years 1922 to 1929. (This last testimony is summarized, not quoted literally.)

We submit that, under the repeated decisions of this court, a property tax which bears no relationship to the amount of the taxable property in the state, is unequal taxation, discriminatory, denies the taxpayer the equal protection of the law and takes his property without due process of law in violation of the Fourteenth Amendment.

Hans Rees' Sons v. North Carolina, 283 U. S. 123, 134, 135.

Southern Ry. Co. v. Kentucky, 274 U. S. 76, 80.

Shaffer v. Carter, 252 U. S. 37, 52, 53, 57.

Oklahoma v. Wells Fargo & Co., 223 U. S. 298.

Hopkins v. Southern California Telephone Co., 275 U. S. 393,

Wallace v. Hines, 253 U. S. 66.

Union Tank Line Co. v. Wright, 249 U. S. 275,

The gross income on which the Minnesota tax is imposed is the method used by the State of Minnesota in determining the value of appellant's property in the state and in measuring its share of the tax burden. Where interstate gross earnings are taxed, the proportion of such interstate system gross earnings allocated to a state for taxation purposes must be in an appropriate proportion,—it must have a fair, rational and non-discriminatory relationship to the amount of taxable property in the state.

In *Southern Railway Company v. Kentucky*, 274 U. S. 76, the Kentucky statutes provided for the capitalization

of the net railway operating income of the entire system and allocated to Kentucky its mileage proportion of that amount. The evidence disclosed that the mileage basis of apportionment was arbitrary and unjust. And, as in the present instance, the operation of the road in the state was a losing venture. The basis for apportionment was held to violate the due process clause of the Fourteenth Amendment, not of course because the business was a losing venture, but because it allocated to Kentucky values which did not there exist.

In *Oklahoma v. Wells Fargo & Company*, 223 U. S. 298, the Oklahoma tax on gross revenue of corporations was condemned as an unconstitutional burden on interstate commerce. In the present instance the Minnesota tax is attacked, not only as an unconstitutional burden on interstate commerce, but also upon the grounds that it is so arbitrary, unequal and discriminatory as to deny the equal protection of the law and take property without due process. Regardless of the ground on which the attack is sustained the basis of allocation is unsound and the tax must be condemned. It is true that in this Oklahoma case the tax was not a property tax, but was a tax on revenue. But it was condemned because the tax was on gross receipts not properly attributable to the state.

In *Wallace v. Hines*, 253 U. S. 66, the North Dakota statute was condemned because of the method used in allocating values to the state. The evidence disclosed that the basis used was indefensible.

In *Great Northern Ry. Co. v. Weeks*, 297 U. S. 135, the basis of apportioning value of the railway to the State of North Dakota for taxation purposes was condemned under the due process clause, and also attacked under the equal protection and commerce clauses, for the reason that

it was shown to have been arbitrarily made and grossly excessive.

It has long been recognized that discrimination between taxpayers, if intentional or so persistent as to be systematic, is a denial of equal protection, whether the discrimination is in the application of different rates to property in the same class or inequality in its valuation.

Iowa Des Moines Bank v. Bennett, 284 U. S. 239, 245;

Cumberland Coal Company v. Board of Review, 284 U. S. 83;

Chicago G. W. Ry. Co. v. Kendall, 266 U. S. 94, 98, 99;

Sioux City Bridge Company v. Dakota County, 260 U. S. 441, 445.

Raymond v. Chicago Traction Company, 207 U. S. 20, 37.

We make no pretense of citing all of the cases in point. Each case of this character must of necessity be decided upon the record in that particular case. Where, as in the present instance, the tax officials of the state finally admit that there is no relationship whatever between the amount of the tax produced by the application of a particular formula, which the state attempts to use, and the amount of the property which the state seeks to tax; where, during the years in question, but six or seven other railroads out of forty-nine in the state, would be taxed in any amount whatever under this formula; where the tax is based on the amount of operations, not of the taxed railroad but of other roads in the state; and finally where as a result of the use of the formula the amount of the tax increases as the relative amount of the reporting railroad's business decreases,—it is clear the tax cannot be justified.

If these per diem credits are taxable in any amount, and we contend they are not, the amount of the tax must be appropriately proportionate to the amount of the taxpayers property in the state. Since it is not, it is unequal, discriminatory, is therefore lacking in due process, and is an unreasonable burden on interstate commerce.

A copy of appellant's income account filed with the Interstate Commerce Commission for each of the years 1922-1929 was introduced in evidence as defendant's Exhibit 13 (R. 55, 56) and the witness who identified this exhibit testified therefrom (R. 56) *that for each of the years 1922 through 1929, excepting only the year 1924, the Illinois Central actually had a debit balance for the hire of freight cars.* There was no credit balance in favor of the Illinois Central System for hire of equipment for any year except 1924. In 1924 the credits exceeded the debits by \$795,360. In the other seven years the debits exceeded the credits as follows: for 1922 the net debit was \$95,674; in 1923 the net debit was \$1,327,898; in 1925 the net debit was \$340,722; in 1926 the net debit was \$1,306,986; in 1927 the net debit was \$2,275,061; in 1928 the net debit was \$1,183,686; in 1929 the net debit was \$1,278,976.

Yet, in every one of these years the Burlington formula produces a result which indicates that the Illinois Central had net credits attributable to the state of Minnesota in the following amounts (final judgment, R. 86).

	Minnesota Proportion of Credit Balances	Minnesota Proportion of Debits Balances	Net Credit Balance	Tax @ 5%
1922	\$ 95,359.49	\$ 237.43	\$ 95,122.06	\$ 4,756.10
1923	91,413.54	197.55	91,215.99	4,560.80
1924	89,432.09	350.27	89,081.82	4,454.09
1925	56,146.19	158.21	55,987.98	2,799.40
1926	30,544.42	197.18	30,347.24	1,517.36
1927	60,132.80	83.89	60,048.91	3,002.45
1928	57,495.76	100.97	57,394.79	2,869.74
1929	49,184.12	91.18	49,092.94	2,454.65
	\$ 529,708.41	\$ 1,416.68	\$ 528,291.73	\$ 26,414.59

These nonexistent or fictitious net credit balances are used by the state of Minnesota to add an element of taxable value to the cars or other property; whereas the evidence is uncontradicted that in seven of the eight years in question the appellant received no net rentals for hire of equipment at all but, on the contrary, paid out substantially more than it received as a result of the enforced interchange of freight cars. Bearing in mind that the Minnesota gross earnings tax is a property tax, the conclusion is obvious that the state is using a fictitious factor in determining the value of appellant's property in the state.

As stated earlier in our brief, credit balances for hire of equipment can only be considered an element of value of railroad freight cars when the entire result of the interchange of cars between appellant and all other railroads is taken into consideration. There is no credit balance and there are no earnings until a balance is struck for the system as a whole.

The interchange of freight cars between railroads is such that Illinois Central cars sometimes go into states such as Florida or California, where the Illinois Central has no tracks. If the Burlington formula should be sustained, fictitious credit balances could be assumed to exist in those states, since there would be no allowable offsets, due to the absence of tracks. Every state in the Union in which the Illinois Central has no tracks would have a credit balance to tax. This would be true even though the net system balance was against the company, as it was for seven of the eight years in controversy.

Mr. G. J. Bunting, vice-president of the Illinois Central, testified (R. 57-79) that the amount of interchanging the Illinois Central does at points in Minnesota (except the interchange with the M. & St. L. at Albert Lea) is ex-

tremely small, and that there is no probability that the same percentage of car days accrued in Minnesota is indicated by the freight car mileage of the using railroad. The state offered no evidence whatever to meet this nor to disprove the other statements which show how completely unfair and unworkable the formula is.

If freight cars per diem credits are to be used as the measure or partial measure of the value of the property of a railroad for tax purposes in the state of Minnesota, then they must be used to measure the value of the property of *all* the railroads in the state. Otherwise there is obvious discrimination. It cannot legally be used to measure the value of but six or seven and not of the other thirty or more. As appears from the returns of the railroads for 1935 and 1936, (Exhibit 21) the use of the Burlington formula produces a tax on freight car per diem credits of but seven other roads; six others if applied to the figures in 1922-1929.

It is a matter of common knowledge, is shown by the record, and will be admitted by the state, that on every road in the state there are, during every six months period, thousands of cars owned by other companies. This is necessarily and inevitably true because of the provisions of the Interstate Commerce Act which require the carriers to take all shipments through to destination in the same car.

There can be no justification for increasing the taxable value of roads like the Illinois Central with but eleven one hundredths of one per cent of its mileage in the state and failing to use the same yardstick for thirty-two other roads in the state with fifty or a hundred times more mileage and property subject to taxation. (See table heretofore shown.)

The vice of the Burlington formula is that it produces a tax (or attempts to create a property value) increasingly large as the relative proportion of the taxpayers property in the state decreases.

Or expressing it another way, the smaller the percentage of the road in Minnesota the greater is the proportion of its freight car per diem credits taxed. If the taxable value is to be measured by the amount of business done, *i. e.*, by the amount of gross earnings, the exact contrary should be true.

Upon hasty consideration there is a certain degree of plausibility about the Burlington formula, but it will not stand careful analysis. It may well have been available for the settlement of a lawsuit, but it is clearly unworkable and incapable of general application. Assessing the value of railroad property according to the amount of business done by some other company on the line of such other company is contrary to the fundamental conception of a gross earnings tax, used as here, in lieu of a property tax.

If freight car per diem credits are to be taxed, the proportion allocated to Minnesota must be under some such formula as that promulgated and used by the state during all these years (Ex. 2, R. 76A), namely: a percentage fairly comparable to the proportion of the reporting roads property in the state. This was fairly measured by the Minnesota proportion of system revenue freight car miles. It can not, within constitutional limits, be measured by the amount of business done on some other road.

III and IV.

The Application in 1935 of a Then Invented Formula for the Allocation of Interstate Gross Earnings in 1922-29 Is Beyond the Limit of Permissible Retroactivity. This Is Particularly True Where the Full Amount of the Tax Demanded by the State Has Been Paid and Where the Accounts for the Years in Question Have Been Audited and the Balance Found Due Paid.

The Record shows:

1. The Minnesota legislature authorized the public examiner with the approval of the tax commission to prescribe the uniform system of accounts or formula (Sec. 2239, Appendix B).
2. The public examiner with the approval of the tax commission did prescribe the system to be followed (Ex. 2, R. 76A).
3. The Illinois Central paid the full amount of the tax computed under the system prescribed by the state (R. 27, 61).
4. The Minnesota statute provides for the auditing of the accounts by the corporate examiner and the certification of any unpaid balance (Sec. 3282, Appendix C).
5. Such an audit was made (R. 20, 21).
6. The balance found due as the result of the audit was paid (R. 21).
7. The Burlington formula first came into the case in a motion of the state for amended findings or a new trial November 21, 1935 (R. 84, 97).

The foregoing statements, numbered only to separate and emphasize them, clearly disclose how arbitrary and unreasonable the action of the state in seeking to impose this additional tax has been. If in 1935 the state could legally impose an additional tax on alleged gross earnings in 1922-29 after the tax had been paid in the full amount; computed according to the formula prescribed by an agency of the state acting with legislative authority, then there is

nothing to prevent the state from discarding the formula judicially adopted in 1935 and imposing an additional tax in 1948 and again in 1961 and again every thirteen years thereafter, *ad infinitum*.

Although the right of a state to determine for itself the form in which the tax burden shall be shared is unquestioned, and a wide discretion is allowed in prescribing the kind of taxation, yet there are, and necessarily must be, constitutional limitations on the power. The tax may not be capricious, arbitrary, discriminatory, nor unequal when applied to taxpayers in the same class.

Likewise there must of necessity be a limitation upon permissible retroactivity. While no attempt has ever been made by this court to precisely define or prescribe the limit to which a statute, or a formula used in the application of the statute, may be retroactively applied, the court has definitely recognized that there is a limit.

The question was considered in *Welch v. Henry*, 305 U. S. 134. There the Wisconsin statute, enacted in March 1935, imposed a tax on corporate dividends received in 1933. Claim was made that it contravened the equal protection and due process clauses of the Fourteenth Amendment. The court said, page 148:

"Assuming that a tax may attempt to reach events so far in the past as to render the objection valid, we think that no such case is presented here".

And further, page 150-1:

"In the present case the returns of income received in 1933 were filed and became available in March, 1934. Wisconsin Stat. 1933, Sec. 71.09 (4). The next succeeding session of the legislature at which tax legislation could be considered was in 1935, when the challenged statute was passed. By Sec. 11, Art. IV; Sec. 4, Art. V, of the Wisconsin constitution, and Sec. 12.02 Wisconsin Statutes, 1935, regular sessions of the legislature are held in each odd-numbered year. Special ses-

sions of the legislature may be held on call of the governor, at which no business can be transacted 'except as shall be necessary to accomplish the special purposes for which it was convened.' A special session was called by the governor in 1934, but for purposes unrelated to taxation. Proclamations of the Governor of Wisconsin December 2, 28, 1933, January 18, 22, 30, 1934. Thus the legislature in 1935, *at the first opportunity after the tax year in which the income was received*, made its revision of the tax laws applicable to 1933 income, as did Congress in the Joint Resolution of July 4, 1864, commented on in *Stockdale v. Insurance Companies, supra*.

"While the Supreme Court of Wisconsin thought that the present tax might 'approach or reach the limit of permissible retroactivity,' we cannot say that it exceeds it."

The court further said the taxpayer can not:

"* * * justly assert surprise or complain of arbitrary action in the retroactive apportionment of tax burdens to income at the first opportunity after knowledge of the nature and amount of the income is available. And we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied, *Cooper v. United States*, 280 U. S. 409, 411, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment."

If recent transactions to which the statute may be retroactively applied must be those arising during the preceding calendar and legislative year, or some period not greatly in excess of such limitation, it follows that the retroactive application of a taxing statute in 1935 to gross earnings in 1922-3-4-5-6-7-8 and 9 cannot be justified.

Retroactive taxes on gifts have been condemned because the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made the taxable event. The facts in the present instance meet this test,

although this court has never held that the constitutionality of a retroactive statute should stand or fall on that ground alone. The record discloses that appellant operates but thirty miles of railroad in Minnesota. This has been operated at a loss. Whether the operation producing gross earnings which is the basis of the tax would have been continued all these years had it been known the amount of past tax liability would be subject to capricious change and recurring additions, was a question which might well have been answered by withdrawal from the state. Certainly the taxpayer could not reasonably have anticipated that any such action as was taken would be taken by the state.

Retroactive application of a taxing statute has been sustained to include transactions consummated while the statute was in the course of enactment, *United States v. Hudson*, 299 U. S. 498, 500; where made applicable during that part of the same year preceding its enactment, *Stockdale v. Insurance Companies*, 87 U. S. 323, 331; where applicable to the preceding part of same year during which Sixteenth Amendment was operative, *Brushaser v. Union Pacific R. R.*, 240 U. S. 1-20; to transactions consummated during the same calendar year, *Cooper v. United States*, 280 U. S. 409, 411; and where it is the continuance of a similar provision in a prior statute, *Milliken v. U. S.*, 283 U. S. 15, 13.

But the books will be searched in vain for any decision upholding the retroactive application of a tax to a period antedating its application by thirteen years, where too the tax demanded by the state at the time had been paid.

Every reason for condemning the retroactive application of the tax law in *Nichols v. Coolidge*, 274 U. S. 531; *Blodgett v. Holden*, 275 U. S. 142; *Untermeyer v. Anderson*, 276 U. S. 440, exists in the present instance. It must be admitted that a tax on gross earnings retroactively applied

to transactions which occurred thirteen years prior to the exaction may in certain circumstances become as arbitrary and unreasonable as though the tax were on a gift. However disposed the court may be to sustain the taxing power of the state, the circumstances of the present case and the attempted exaction is so palpably unfair and unreasonable as to be wholly indefensible.

The court of appeals of New York in *People v. Graves*, 21 N. E. (2d) 371 condemned as unconstitutional the retroactive application of an income tax statute effective in 1935 which by its terms was made retroactive to January 1, 1919. The court said, page 372:

"While it is true that not all retroactive statutes are void, nevertheless, it is a fundamental rule of construction that retroactive operation of statutes is not favored by courts and will not be given such construction unless the language expressly or by necessary implication requires it. Whether a statute which by its express terms is retroactive will be sustained is usually a question of degree.

"Taxing statutes which by their terms were retroactive for short periods have been held to be valid. No case has ever held such a statute to be valid which attempted to permit a retroactive assessment of a tax for as long a period as sixteen years." . . .

"We believe the amendment is unreasonable, arbitrary, capricious and palpably unjust."

The Supreme Court of Minnesota has also condemned statutes because retroactive.

State v. Western Union Telephone Company, 111 Minn. 21.

Gray v. City of St. Paul, 105 Minn. 19.

Although the objections were repeatedly raised and emphatically called to the attention of the State Supreme Court as clearly appears from the averments of the

answer, the briefs filed in the Supreme Court and the decisions of the court itself, yet the court chose to summarily dispose of all constitutional objections by the *ipse dixit*:

"If computation of defendant's credit balances from the interchange of freight cars with railroads operating in this state according to the said formula or method reaches accuracy more nearly than any other, all constitutional objections to its use vanish."

In the light of the facts disclosed by the record in this case perhaps this summary disposition of constitutional objections was the best available. Furthermore the record discloses that the formula legally adopted by the taxing authorities (Rec. 76A) and judicially discarded, was far more accurate.

V.

A "Statute of Any State", Decision Concerning the Constitutionality of Which May Be Reviewed on Appeal, Is Not Limited to Enactments of the State Legislature, But Includes Every Act, Legislative in Character, to Which the State Gives the Force of Law, Such as an Order of a State Tax Commission, or the Decision of a Court Substituting Its Choice of a Formula for That Prescribed by the Commission.

King Mfg. Co. v. City Council of Augusta (1929), 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

Live Oak Water Users' Ass'n v. Railroad Commission of State of California (1926), 269 U. S. 354, 46 S. Ct. 149, 70 L. Ed. 305.

Hamilton v. Regents of University of California (1934), 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343.

Lake Erie & Western R. R. Co. v. State Public Commission ex rel. Cameron, 249 U. S. 422-4.

Sultan Ry. Co. v. Dept. of Labor, 277 U. S. 135.

The merits of the case are not involved under this point. It is argued by the state in objections to the jurisdiction of this court that:

"The statute itself was not subject to attack, but the computation of a tax under the statute."

This is not an exact statement of appellant's position. The attack is not on the computation, but is on the application of a formula. The State of Minnesota attempts to make the formula a part of the statute itself, although it can not be found in the statute. Appellant contends that if the statute be construed so as to permit the application of this formula, it is unconstitutional.

While the exaction is not legislative, it is attempted nevertheless under a state statute and is subject to constitutional limitations. As this court said in *King Mfg. Co. v. Augusta*, 277 U. S. 100-103:

"It of course rests with each State to determine in what form and by what agencies its legislative power may be exerted. It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide lawmaking functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state commissions. But whether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, laws, ordinances or orders, are in essence legislative acts of the State; they express its will and have no force otherwise. As respects their validity under the Constitution of the United States all are on the same plane. If they contravene the restraints which that instrument places on the legislative power of a State they are invalid, no matter what their form or by what agency put forth; for, as this Court has said, the protection which these restraints afford applies, 'whatever the form in which the legislative power is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated leg-

islative authority, like an ordinance of a municipality or an order of a commission." *Standard Scale Company v. Farrell*, 249 U. S. 571, 577.'"

Conclusion.

We contend:

First. The Minnesota gross earnings tax cannot be applied to freight car *per diem* rentals in any amount.

Second. The attempted application of the Burlington formula is so discriminatory, capricious and unreasonable as to violate the equal protection, due process and commerce clauses.

Third. If any amount was due under the statute, it was paid in full, computed under a formula prescribed by the agency of the state authorized by the legislature to act.

Fourth. The retroactive application of the formula exceeds the permissible limit.

Respectfully submitted,

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APPENDIX A.

(Secs. 2246-9 Mason's Minnesota Statutes 1927.)

RAILROAD COMPANIES.

2246. *Gross earnings.*—Every railroad company owning or operating any line of railroad situated within or partly within this state, shall, during the year 1913 and annually thereafter, pay into the treasury of the state, in lieu of all taxes, upon all property within this state owned or operated for railway purposes, by such company, including equipment, appurtenances, appendages and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state.

On or before August 15, 1913, and annually thereafter, each such railroad company shall make, according to law, a true and just return of all such gross earnings for the six months ending June 30th next preceding, and the said tax of five per centum thereon shall become due and payable to the state of Minnesota in manner provided by law, on September 1st next thereafter.

On or before February 15, 1914, and annually thereafter, each such railroad company shall make, according to law, a true and just return of all such gross earnings for the six months ending December 31st next preceding, and said tax of five per centum thereon shall become due and payable to the state of Minnesota in manner provided by law, on March 1st next thereafter; and the payments of such sums at the times hereinbefore set forth shall be in full and in lieu of all other taxes upon the property and franchises so taxed.

The lands acquired by public grant shall be and remain

exempt from taxation until sold or contracted to be sold or conveyed as provided in the respective acts whereby such grants were made or recognized ('12 c. 9 S. 1; amended '19 c. 533) (2226).

2247. "*Gross earnings*" defined.—The term "the gross earnings derived from the operation of such line of railway within this state," as used in section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state ('12 c. 9 S. 2) (2227).

2248. *Repeal*.—All acts and parts of acts not inconsistent herewith, regulating the payment, collection, time of payment, enforcement or reports involving the amount of taxes upon the gross earnings of railroad companies within this state or providing penalties for the nonpayment of such taxes, are hereby made applicable to this act so far as may be, and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed ('12 c. 9 S. 3) (2228).

2249. *Collection by civil action*.—Upon failure to pay the amount of such taxes legally due, upon the respective dates hereinbefore set forth, collection thereof may be enforced in addition to existing remedies in a civil action brought in the name of the state of Minnesota in the district court of any county ('12 c. 9 S. 4) (2229).

APPENDIX B.

(Sec. 2239 Mason's Minnesota Statutes 1927.)

2239. *Uniform system of accounting.*—The public examiner, with the approval of the tax commission, shall have authority and power to prescribe for such companies, joint stock associations, co-partnerships, corporations, or individuals a system of gross earnings accounts, that shall be uniform for each class of companies, and he shall supervise the method of keeping such accounts; provided, that such system shall conform as nearly as practicable with that prescribed for such companies by the United States government ('13 c. 487 S. 6) (2219).

APPENDIX C.

3282. *Gross earnings for taxation.*—In like manner and with like powers, as provided by section 3 (3229) hereof, the public examiner, at least once a year, so far as practicable, shall visit all railroad and other corporations and companies which are required by law to pay taxes to the state upon a gross earnings basis, examine their books of account and all other records and papers bearing upon or evidencing their gross earnings upon which, under the law, taxes should be paid in this state, and certify to the Minnesota tax commission the amount of such taxable earnings; and in case he shall discover errors and omissions in the gross earnings as reported by such companies, he shall certify the amount of such omitted earnings, together with the additional taxes and penalties due for collection as provided by law. All evasions and violations of the law in respect to such gross earnings taxes, which the public examiner may discover he shall report to the governor, the Minnesota tax commission and attorney-general, and said officials shall institute such proceedings as the law and the public interest require ('13 c. 555 S. 9) (3235).

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CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1939.

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

REPLY BRIEF OF APPELLANT.

DOHERTY, RUMBLE, BUTLER, SULLIVAN &
MITCHELL,

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REPLY BRIEF OF APPELLANT.

Certain statements made in the brief of appellee are, we believe, misleading. This reply is therefore made. The order of appellee's argument is followed.

I.

A. The rule of practical construction is invoked. The claim is, that since the railroad company in making its reports acquiesced in the inclusion of credit balances, it may not now question the right of the State to tax them. An examination of Exhibit 2 (R. 76-A), being the printed form of report furnished by the Minnesota Tax Commission, does include item 22(a), "credit balance freight cars in transportation service." The total amount of tax

paid by the Company on this item for the eight years in question, computed according to the rules, or uniform system of accounts, or formula (whichever it may be designated) prescribed by the state, amounted to but a few dollars,—\$153.73 to be exact. This is obviously not such an amount as would justify protracted litigation to test the legality of its imposition. Using the state's form and following its formula in reporting a small tax is surely no bar to contesting the imposition of a much larger one under a wholly different formula, later on.

Mere payment of a tax without protest however long continued does not create an estoppel. This exact question has been decided in *Kansas C. S. Railway Co. v. Ogden Levee District*, 15 Fed. (2d) 637, 643 (affirmed again in 39 Fed. (2d) 884) wherein it was held that the fact that a railroad company had paid a levee tax for fourteen years without protest, during which time bonds had been levied by the levee district, did not create an estoppel. In *Morgan, etc. R. R. Co. v. Aucoin*, 140 La. 768, 73 So. 859, the Supreme Court of Louisiana held that the mere fact that the plaintiff railroad company had paid a certain tax from 1908 to 1914 at exactly the same rate "could not possibly be good ground for continuing to pay it".

But we adopt appellee's suggestion that the rule of practical construction be applied. It is disclosed by the record that from 1908 until 1934 when this suit was brought, the State of Minnesota, acting through its Public Examiner and Tax Commission, placed a very definite construction on the gross earnings statute. This construction is explicitly disclosed by the printed instructions found on the back of the form furnished to the railroads for their use in making their returns. The following instruction from the Tax Commission to the railroads is found thereon (see Exhibit 2, R. page 760A, underscored in red):

"NOTE—You are to report to the State of Minnesota for taxation purposes, (a) the credit balance, if

any, on freight equipment used in transportation service and interchanged with foreign roads on the per diem or mileage basis. Minnesota proportion of said credit balance to be computed by applying the percentage that the average revenue freight car mileage in Minnesota bears to the total average revenue freight car mileage of the entire line during the calendar year."

Thus for twenty-five years the taxing officials for the State of Minnesota, acting under express statutory authority (Sec. 2239, Mason's Minnesota Statutes 1937, App. B, Appellant's Brief, page 57) did place a construction on the gross earnings statute, compliance with which required the railroad company to allocate to Minnesota only so much of the per diem credit balances, if any, as equaled the Minnesota percentage of revenue freight car mileage of the reporting road.

A contemporaneous exposition of statutory provisions not clear in themselves, and well established practice under them universally acquiesced in and followed for a long period of years, is entitled to great weight and consideration by the courts.

State v. Northern Pac. Ry. Co., 95 Minn. 43, 103 N. W. 731.

In re Estate of Boutin, 149 Minn. 148, 182 N. W. 990.

City of South St. Paul v. Northern States Power Co., 189 Minn. 26, 248 N. W. 288.

In re Strauch's Estate, 95 Minn. 304, 104 N. W. 535.

U. S. v. Minnesota, 270 U. S. 181-205.

U. S. v. Burlington & Missouri River R. R. Co., 98 U. S. 334-41.

Schell's Executors v. Fauche, 138 U. S. 562-72.

Louisiana v. Garfield, 211 U. S. 70-6.

U. S. v. Hammers, 221 U. S. 220-8.

Logan v. Davis, 233 U. S. 613-27.

This rule, which finds universal support in the decisions, is particularly applicable to the facts in this case. It approaches unconscionable action for the state to adopt a definite construction of the statute and follow it for twenty-five years, then to suddenly abandon it for no reason at all except to reach a larger part of fictitious interstate earnings than its previous construction permitted.

This is exactly the basis of allocation for which appellant now contends, if per diem credits are taxable in any amount.

This formula found on the printed form furnished by the State is referred to in appellee's brief as "defendant's formula". The only basis for so designating it lies in the fact that the railroad company has at all times during this litigation consistently urged that it should be followed. First, because it is the formula which was prescribed by the taxing authorities acting under specific statutory authority, and second, because it does allocate to Minnesota a proportion of interstate per diem credits, having some appropriate and rational relationship to the amount or value of appellant's taxable property in the state. For obvious reasons, the State does not now refer to it as its formula, although it does not dispute, nor can it dispute under the facts disclosed by the record, that this formula was, in fact, adopted by the Public Examiner and Tax Commission and was in actual and unvarying use for a period of twenty-five years. The Supreme Court of Minnesota expressly recognizes this, saying: (*State v. Illinois Central R. Co.*, 274 N. W. 828, 829; R. 101)

"The Minnesota Tax Commission had promulgated rules and furnished printed forms for the returns. The rules incorporated that of *State v. Minnesota & International Ry. Co.*, 106 Minn. 176, together with the following: Note—(Above formula, Ex. 2, quoted.)"

We, therefore, welcome application of the rule invoked by appellee as stated at page 12 of its brief:

"In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

B. It is said that appellant's answer does not deny the right of the State to tax per diem credits in any amount, that the objection is to additional taxes only.

The amended and substituted answer (R. 3-8) speaks for itself:

"VI. The defendant alleges that such exchange of cars is a mere interchange of service and does not produce or constitute gross earnings or revenue in the operation of the railroad within the provisions of the Minnesota statute."

Then too paragraph III of the answer is a general denial, which alone is sufficient to put in issue the right to any recovery.

C. The second answer to appellee's contentions is that any question concerning the sufficiency of the answer should have been raised in the Minnesota court. The Minnesota courts accepted the answer as sufficient and passed on the question.

D. The first judgment (R. 98) was based on a formula (shown by the findings of fact and conclusions of law (R. 77-81)) which was neither urged by the state nor suggested by the company. It was one invented by the trial court. The amount of the tax it produced was not large and there was no occasion for defendant to appeal. Estoppel to question the Burlington formula cannot be based on failure to prosecute an appeal from a judgment based on one entirely different.

"No estoppel arises by acquiescence in acts other than or different from the acts which the party claim-

ing the estoppel alleges he is entitled to commit by reason of the estoppel."

21 C. J. Sec. 222, p. 218.

Nor will mere non-action or passivity create an estoppel (ibid).

Contrary to appellee's contention, the assignment of errors in the Supreme Court of Minnesota, set out as Appendix A in appellee's brief, definitely shows that the questions herein were all raised in the Supreme Court of Minnesota. Error is there predicated on the application of the Burlington formula to produce a tax *in any amount*; and is likewise predicated on the rendition of a judgment in any amount. It is true the assignment of errors includes the objection to additional taxes, but since the State was seeking to impose an additional tax, of necessity that objection was made.

E. It is only necessary to examine the assignment of errors in this court (R. 219-221) to make certain that the question of the right to tax in any amount is raised. The first assignment raises an objection to the entire judgment.

AVAILABILITY OF ACTUAL FIGURES.

Appellee unequivocally states:

"that railroad companies can get the actual figures showing the periods of time when a car is on their line." (App. Brief, p. 4.)

To this is added:

"But they contend it would be expensive."

The record does not support the claim made. Reference is to page 47. There it is said, that wheel reports (long since destroyed under rules of the Interstate Commerce Commission) disclose:

"the period of time, *within a day*, when a foreign car is on your line and the dates of your cars were on foreign lines."

This falls far short of supporting the statement made by appellee. It will be noted that the wheelage reports would be accurate "*within a day*". Applied to the vast number of these items, an error of one day would make possible inaccuracy in the totals running into millions. The actual figures are not available (R. 68) and every court in Minnesota having anything to do with this case so found. The Supreme Court of Minnesota said, adopting the language of the trial judge (R. 101):

"The defendant's records which would show the number of days its freight cars were in possession of other Minnesota roads, in Minnesota during said eight year period, were, pursuant to the rules of the Interstate Commerce Commission, destroyed by defendant before this controversy arose, so that the number of correct days to be apportioned to Minnesota cannot be determined to a mathematical certainty. *That would be impossible in any event* because the best practicable records (the wheel reports) would seldom if ever disclose just when or where a freight car crossed a state line."

The belated offer of the State to accept the actual figures is not only gratuitous, but meaningless. Any obligation to attempt to furnish the nearest approach to actual figures was definitely waived by the State in promulgating the rules found on the printed form furnished by the Tax Commission (Ex. 2). The Chairman of the Commission, Mr. Boyle, testified that actual figures had never been required by the state (R. 122). Realizing that the actual figures were not available, the Commission, in these printed instructions, told the carriers to strike a system balance and allocate to Minnesota a percentage of the credit balance, if any, equal to the percentage of the reporting road's revenue freight car mileage in the State. This was consistently done for twenty-five years.

II.

TAXABILITY OF CAR RENTAL CREDIT BALANCES.

It is next argued by appellee that car rental credit balances are taxable. This is perhaps true if the tax is not treated as a tax on income as such, derived from interstate operations, in which event it would be a burden on commerce. It is perhaps also true, if it is not a tax on the cars themselves since they have no taxable situs in Minnesota. It is perhaps also true, if it is not a tax on the cars themselves, so considered as the result of the taxation of the freight earnings of such cars, since such earnings are already taxed against the using line, and the result would be double taxation which the Supreme Court of Minnesota has repeatedly held was not intended.

State v. St. Paul Union Depot, 42 Minn. 142, 43 N. W. 840.

In the final analysis these freight car per diem credit balances (which, if taxable, must be actual, not fictitious) can only be constitutionally taxed when treated, not as a true tax on the income itself, but solely as a convenient method for measuring the value of the taxable property in the State. If used for this permissible purpose, the amount of the credit balances, if any, arising from the interstate operations allocated to the State of Minnesota, must have some reasonable and appropriate relationship to the value of the property taxed. It is this later essential qualification and limitation that appellee blithely ignores.

The tax is not a tax on income as such. It is a tax on property in lieu of all other taxes.

Minnesota & St. L. R. R. Co. v. Koerner, 85 Minn. 149, 88 N. W. 430, 431.

State v. Great Northern R. R. Co., 163 Minn. 88.

State v. Illinois Central R. R. Co., 200 Minn. 583, 274 N. W. 828, 829.

(R. 100.) It would be unnecessary to repeat that it is a tax on property in lieu of all other taxes but for the apparent insistence of appellee that this fact may be ignored and, to justify the new formula, it has a right to treat the tax as a true tax on income. This is obviously the erroneous assumption on which the decisions of the Supreme Court of Minnesota in this case are based. The court and counsel for appellee have consistently refused to admit that the amount of interstate earnings allocated to Minnesota for taxation and for use as a measure of the tax on taxable property in the State must have a reasonable and appropriate relationship to the amount and value of the property sought to be taxed.

It is suggested that the tax computed under the Burlington formula is not shown to exceed that which would be imposed on an ad valorem basis. This suggestion would be pertinent but for the fact that the relationship between actual and assessed values, varies in the several counties of the State. No attempt has ever been made by the State to fix any ratio of actual value to the assessed value of railroad property, nor would the taxing authorities or representatives of the State at the trial admit that any such ratio of percentages uniformly existed or could be shown. The State has chosen to measure the value of railroad property by gross earnings. That yardstick has been misused. It is definitely shown without dispute, that the smaller the road, i. e. the less property it has in the state, the greater is the percentage of per diem credits taxed; this coupled with the admission of the state taxing authorities that there is no relation between the amount of the tax and the amount of property taxed (R. 149, 151) is sufficient to condemn the newly adopted formula.

PER DIEM CREDITS NOT AN ASSET.

It is said by appellee (B. 21):

"The use by other railroads of rolling stock or freight cars is an asset to a railroad company."

This assertion is not supported by the record. On the contrary, the record shows without dispute that the average cost of owning a freight car is \$1.05 to \$1.17 per day (R. 62). The compulsory interchange of cars under Section 15 of the Interstate Commerce Act is a hardship and adds nothing whatever to the value of railroad property. In the light of this uncontradicted evidence, the argument that the use by other railroads of freight cars belonging to a carrier is an intangible asset adding to the value of railroad property, which might be used as the basis for increasing its assessed valuation, thus finds no support in the record, but the exact contrary is shown. Unless the loss of from 5 to 17 cents per car per day while on other lines is an advantage, which only the stubbornness of the company suffering the loss prevents it from acknowledging. The argument belongs in the same category as that advanced by the State in contending that the Burlington formula should be used, since it converts an actual system deficit (for seven of the eight years in question) (R. 56) into a fictitious taxable credit.

III.

IS THE BURLINGTON FORMULA FAIR.

Appellee repeats the *ipse dixit* of the Supreme Court that the Burlington formula is the fairest and most accurate which can be devised. Passing the admitted fact that it was never adopted by that agency of the state authorized by statute (Sec. 2239, App. B) to prescribe the

system of accounts to be followed, this conception of fairness is confronted with the following stark facts:

A. It has, as the evidence shows, and the corporate examiner of the state having charge of this tax litigation admits (R. 151) no appropriate relationship to the value of the property taxed.

B. The smaller the road, and consequently the less the value of its property, the greater is the percentage of the credit balances taxed. (R. 144, 152, 154, 165, 170, Ex. 21, and tabulated statements which have been certified to the Clerk of this Court.)

C. It is discriminatory. In 1935 and 1936 it produced no tax whatever against 19 other roads which filed returns, most of which had many times as much property in the State subject to taxation as had the Illinois Central (see same statements).

D. It turns an actual debit balance into a fictitious credit balance. (R. 56.)

E. The amount of interstate earnings allocated to Minnesota for taxation under it is based upon the mileage of railroads other than the taxed or reporting road, contrary to any reasonable conception of a gross earnings tax, since obviously interstate gross earnings should be allocated to a state for taxation purposes in proportion to the value of the property and the extent of operation of the line of the reporting or taxed company.

DOUBLE TAXATION.

It is said by appellee:

"A tax that is not based on an arbitrary discrimination is not objectionable because it is a double or unequal tax." (B. R. 33.)

No claim is made that double taxation in itself is unconstitutional. It is contended that if the tax be construed as

a tax on the cars themselves which produce the earnings, it is a burden on commerce because the cars have no taxable situs in Minnesota; so also if it is a tax on the cars, it is double taxation, since the freight earnings of the cars are taxed to the using road *without deduction of the amount paid to the owning road* and is, therefore, a discrimination which the Supreme Court of Minnesota has definitely held was not intended.

State v. St. Paul Union Depot, 42 Minn. 142, 43 N. W. 840, 842.

In *Cudahy Packing Company v. Minnesota*, 246 U. S. 450, 456, the tax on the freight line company was sustained by the Supreme Court of the State of Minnesota (129 Minn. 30) and by this court for the reason that the railroad companies in reporting freight receipts derived from the use of the cars *deducted* the rental paid to the Cudahy Packing Company, the freight line company. The record discloses that the using companies pay a tax on freight earnings *without deduction of any amount paid for per diem rental*.

It is said (B. 34):

"It is impossible to devise a system of taxation which will distribute the tax burden perfectly in accord with every circumstance."

This may be admitted, but surely it is possible to devise a system where the interstate earnings allocated for taxation are in appropriate proportion to the value of the property taxed. If the reporting road's proportion of revenue freight car mileage in Minnesota is used as the factor for allocating to the State a part of interstate earnings for taxation, a reasonable degree of accuracy will be attained. There was no need to change the method used for twenty-five years.

IV.

NON-WAIVER AS RESULT OF MISTAKE IN COLLECTING CORRECT
AMOUNT.

Appellee contends that the State cannot waive payment of the correct amount because of a mistake made by those charged with the collection of the tax. This may be true, but no such situation here exists. The Supreme Court of Minnesota attempted to apply the rule now invoked, saying (R. 107):

"There can be no such estoppel for the simple reason that in the imposition of taxes the State acts in its sovereign, rather than in its proprietary, capacity."

It may be admitted that the state is acting in its sovereign capacity and those charged with the collection of the tax must collect the full amount. We have no quarrel with the soundness of the rule. But acting in a sovereign capacity is no excuse for waiting thirteen years after the tax has been paid in full, according to the system of accounts legally prescribed by the state itself, and then suing for many times as much more, computed under a formula never even heard of until the first trial was over.

The State insists that the full amount due should be paid, but neglects to point out how this full amount could be determined other than by the application of a formula. It chooses to ignore the fact that that agency of the State specifically authorized by the legislature to promulgate a uniform system of accounting, did that very thing, and that only by the use of this formula (Ex. 2, R. 76-A) could the amount of the tax be determined.

The Supreme Court finally admits in the third opinion (R. 200):

"That it had to be computed according to some formula."

It apparently is the contention of the State that the Illinois Central Railroad Company was bound to ignore the formula legally prescribed by the proper state agency and to anticipate that in November, 1939, 13 years later, the State would, and legally could, by judicial construction, adopt an entirely new and different formula or method of accounting,—a formula which, as the record discloses and the Supreme Court admits, was never promulgated by the agency authorized to act. And, as both the trial court and the Supreme Court point out

“was not even suggested below until the motion for amended findings or a new trial.” (R. 97 and 105.)

V.

REVIEWABILITY OF STATE ACTION.

It is scarcely necessary to again point out that the case is one involving the constitutionality of a statute of the State as construed and applied both by the administrative agencies and the Supreme Court of Minnesota. Under the State decisions the formula becomes a part of the statute itself and is properly reviewable on constitutional grounds under Section 237 of the Judicial Code.

Respectfully submitted,

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JAN 11 1940

CHARLES L. HUNTER
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1939.

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,

vs.

STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

**SUPPLEMENTAL REPLY BRIEF OF APPELLANT TO MEET
POINT FIRST RAISED IN ORAL ARGUMENT.**

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TO MEET POINT FIRST RAISED IN
ORAL ARGUMENT.**

A new theory on which to justify use of the Burlington formula having been suggested during oral argument, this supplement to the reply is filed.

The tax cannot be sustained as a tax on cars because:

I. The state makes no claim that it is a tax on the cars only, either (a) in its pleadings and briefs in this action, or (b) in its decisions construing the statute. If the state does not treat it as a tax on cars this court cannot.

Appellee's brief—20: "Minnesota property as a going concern or *unitary enterprise*."

Appellee's brief—24: "to ascertain the value of the property within its borders *when the unit rule is applicable*."

State v. Gt. Northern Ry. Co., 163 Minn. 88, 203 N. W. 453, 454, where it is said:

"It is quite plain that the gross earnings tax is a lien or commutation tax upon *all* the railroad company's property devoted to railroad uses within the state including the cars here in question, for said Section 2246 so states."

i. e., the property of the company must be taken as a whole, a unit, and the tax must be in proportion to the property *as a unit*. *The Burlington formula adds a tax on appellants property, TAKEN AS A UNIT, which increases as the amount of the greater part of that property (the part having the greater taxable value) decreases.*

To put it another way, if the number of its cars in the state remains substantially constant (the number gradually decreased from 1922 to 1930—R. 86—so that this factor or element of value became *decreasingly* important) the tax under the Burlington formula would increase as the amount of its more valuable other property (right of way, tracks, rolling stock on its own line, stations and terminals) decreased. This, we submit, is unequal and discriminatory taxation. The inequality and discrimination becomes still more apparent in the light of the admitted fact that other roads with literally a thousand times more property in the state, including cars on other lines, entirely escape this added burden, or it is proportionately decreased as the total value of their property, *TAKEN AS A UNIT, increases.*

That the tax is on all the property taken as a unit is held in the decision in this case, (R. 100) in addition to the special emphasis laid on the fact by appellee.

If it is treated as a tax on cars only, because it is a tax on the income from the use of the cars, it is unconstitutional for the reasons discussed in part I of appellant's original brief.

II. If it is a tax on cars only, it is discriminatory in that:

(a) Cars of other railroad companies in the state are not taxed (only 7 out of 44 in state, Ex. 21—Appellant's brief 35-37; R. 144, 152, 154, 165, 170).

(b) Cars of foreign railroad companies in the state are not taxed; *their situs for taxation purposes is exactly the same as that of appellant's cars.*

State v. Gt. Northern, 163 Minn. 88.

(c) It is double taxation since the freight earnings are already taxed.

(d) Private car lines are permitted to deduct per diem payments in making their returns.

III. That it is not actually, nor intended by the state to be, a tax on cars is shown by the fact that the cars are already taxed through their freight earnings, *without deduction for any car hire per diem payments.* The Minnesota tax on cars has been sustained only because the amount paid for per diem rental was deducted.

Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 456.

Cudahy Packing Co. v. Minnesota, 129 Minn. 30.

The tax paid by the using road is the full tax on the property it uses whether owned or leased.

Hopkins v. Southern California Tel. Co., 275 U. S. 393, 402.

The state did not intend and does not permit double taxation.

State v. St. Paul M. & M. R. R. Co., 30 Minn. 311, 15 N. W. 307.

State v. St. Paul Union Depot, 42 Minn. 142, 43 N. W. 840, 842.

State v. Gt. Northern Ry. Co., 163 Minn. 88, 203 N. W. 453, 455, where it is said: "This avoids the stigma of double taxation and avoids any

appearance at attempts to tax interstate commerce."

State v. Minnesota & I. Ry. Co., 106 Minn. 176; 118 N. W. 699, 681, where it is said: "If payment of the 3 per centum upon the amount so received would result in double taxation, then these items should not be included."

IV. If it is not a tax on the cars only, but is a tax on all the property of the company in the state it, under the Burlington formula, is unequal, discriminatory and therefore lacking in due process and is a burden on commerce.

(a) It admittedly has no appropriate relationship to the amount of property taxed. (R. 149, 151.)

(b) The smaller the road, *i.e.*, the less property it has in the state, the greater the percentage of credit balance taxed. (R. 144, 152, 154, 165, 170 and exhibits.)

(c) For 1922-28 it produces a tax for only seven of forty-four roads in the state; in 1935-6 a tax on but six of the forty-four. It is therefore unequal and discriminatory in the same class of taxpayers.

The requirement of uniformity is that it operate the same upon all in any one class.

State R. R. Tax Case, 92 U. S. 575.

V. The Burlington formula has not yet been adopted by the Public Examiner and the Tax Commission. It was

(NOTE—Since 37 of the 44 roads in the state pay no such tax, they cannot well be expected to object. Those which pay a tax have a larger percentage of their mileage in the state and thus take credit for several hundred times the percentage allowed appellant of payments to other roads.)

only used in the settlement of certain lawsuits. (R. 124, 126, 132.)

(Counsel for appellee stated in oral argument that the fact was to the contrary.)

VI. Even if it may be adopted for future reports it cannot be made applicable to 1922-9.

(Cases cited p. 13 appellant's original brief.)

Respectfully submitted,

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SUPREME COURT OF THE UNITED

STATES.
CLERK

OCTOBER TERM, 1939

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellant,

vs.

STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

**STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS.**

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 222

STATE OF MINNESOTA,

Respondent,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellant

MOTION OF RESPONDENT TO DISMISS APPEAL.

Comes now the respondent in the above entitled cause, by its counsel of record, and asks that the appeal herein be dismissed.

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STATE OF MINNESOTA IN SUPREME COURT

STATE OF MINNESOTA,

vs.

Respondent,

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellant

**GROUND~~S~~ MAKING AGAINST THE JURISDICTION
OF THE UNITED STATES SUPREME COURT.**

The origin of the controversy involved in the within case is sufficiently stated in appellant's jurisdictional papers.

Appellant contends the United States Supreme Court has jurisdiction of this suit by reason of Section 237, Judicial Code, as amended, 28 U. S. C., Section 344 A, which provides for the review of a final judgment or decree in any suit in the highest court of a State where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution and the State court's decision is in favor of its validity.

The statute under consideration was Section 2246, Mason's Minnesota Statutes of 1927, the so-called "Railroad Gross Earnings Tax Law." However, the statute itself was not subject to attack, but the computation of a tax under the statute.

The system of gross earnings taxation as applied to transportation companies violates no provision of the State or Federal constitution.

State v. Wells-Fargo Co., 146 Minn. 444, 179 N. W. 224;

State v. Pullman Co., 146 Minn. 458, 179 N. W. 224;

U. S. Express Co. v. Minnesota, 223 U. S. 335.

The Minnesota Supreme Court in its decision in the within case, *State v. Illinois Central Railroad Company*, 284 N. W. 360, said:

"Defendant assails the Burlington formula as repugnant to state and federal constitutional provisions. If computation of defendant's credit balances from the interchange of freight cars with railroads operating in this state according to the said formula or method reaches accuracy more nearly than any other, all constitutional objections to its use vanish. That such credit balances constitute gross earnings of a railroad has been settled law since 1908. *State v. Minnesota & International Ry. Co.*, 106 Minn. 176, 118 N. W. 679, 1007, 16 Ann. Cas. 426; *State v. Great Northern Ry. Co.*, 163 Minn. 88, 203 N. W. 453.

"The defenses held not valid on the first appeal do not raise any constitutional question, as we see it, but merely fact issues. * * *"

And in the same case, in its opinion of June 16, 1939, the court said:

"* * * It having been found that the Burlington formula for computing the tax on freight car per diem earnings was proper, and that the one proposed by defendant is not a better formula than the Burlington, it follows that the tax computed according to the Burlington formula violates no provision of the constitution of this state, and we are unable to see that the 14th amendment or any other provision of the federal constitution is violated by the judgment rendered."

Section 237, Judicial Code, as amended, is the only authority for taking a suit to the Federal Supreme Court from the highest court of a State, and the right to review the decision of a State court exists only in cases strictly within its terms.

Martin v. Hunter's Lessee, 1 Wheat. 304, 327, 333, 4 L. Ed. 97;

Cohens v. Virginia, 6 Wheat. 264, 379, 5 L. Ed. 257;

Roller v. Murray, 234 U. S. 738, 34 S. Ct. 902, 58 L. Ed. 1570.

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The court should decline jurisdiction whenever it appears that the constitutional question presented is not, and at the time of granting the writ, was not, substantial in character.

Zucht v. King, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194.

Although a record may present in form a Federal question, a motion to dismiss will be allowed where it plainly appears that the Federal question is of such an unsubstantial character as to cause it to be devoid of all merit and therefore frivolous.

Deming v. Carlisle Packing Co., 226 U. S. 102, 33 S. Ct. 80, 50 L. Ed. 140.

The Minnesota court repeatedly stated that there was no constitutional question involved and that if the tax arrived at by the Burlington formula adopted was a fair approximation or reached accuracy more nearly than any other, any constitutional objection vanished, and decided the question entirely upon non-Federal grounds.

Where the State court "rested its judgment upon a non-Federal ground adequate to support it, the existence of a Federal question is of no significance."

Bilby v. Stewart, 246 U. S. 255, 38 S. Ct. 264, 62 L. Ed. 701;

People ex Rel. Doyle v. Atwell, 261 U. S. 590, 43 S. Ct. 410, 67 L. Ed. 814.

This is the rule even though the Supreme Court might think the position of the State court an unsound one.

Klinger v. Missouri, 13 Wall. 257, 20 L. Ed. 635.

Decisions of State courts based on local laws not involving constitutional questions are not reviewable in the Federal court.

Live Oak Water Users' Ass'n v. Railroad Commission of the State of California, 269 U. S. 354, 46 S. Ct. 149, 70 L. Ed. 305.

The courts are left with a wide range of legislative discretion, notwithstanding provisions of the 14th amendment to the Federal Constitution, and their conclusions respecting the wisdom of their legislative acts are not reviewable by the courts.

Arizona Employers' Liability Cases, 230 U. S. 400, 39 S. Ct. 553, 63 L. Ed. 1058, 6 A. L. R. 1537.

A decision of a state court that the formalities required by the tax laws were fully observed does not appear a Federal question when the contention is not that the statutes are unconstitutional, but that the manner of their observance was a denial of due process of law; "in other words, that the statutes had not been complied with."

French v. Taylor, 199 U. S. 274, 26 S. Ct. 76, 50 L. Ed. 189.

When the constituted authority of the state undertakes to assert the taxing power, and the validity of its action is brought before the Federal Supreme Court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499, 64 L. Ed. 878.

The question whether or not a certain interest in an inheritance tax matter was correctly subjected to the tax is purely a state question, not reviewable by the Federal Supreme Court on writ of error to a state court.

Nickel v. Cole, 256 U. S. 222, 41 S. Ct. 467, 65 L. Ed. 900.

Where, in a suit to enjoin the collection of taxes on a bridge built under authority of an Act of Congress, the power of the state to tax the bridge is not denied, but ob-

jection is made only to the method of taxation under the state laws, a Federal question is not present.

St. Joseph, etc. R. Co. v. Steele, 167 U. S. 659, 17 S. Ct. 925, 42 L. Ed. 315.

Where a state law is admitted to be valid, and the only question is whether it has been correctly construed, the Federal Supreme Court has no jurisdiction.

Commercial Bank v. Buckingham, 5 How. 317, 12 L. Ed. 169.

A decision of the state court resting upon the construction and not upon the validity of a statute of the state does not present a Federal question.

Grand Gulf R., etc., Co. v. Marshall, 12 How. 165, 13 L. Ed. 938.

Ferry v. King County, 141 U. S. 668, 12 S. Ct. 128, 35 L. Ed. 895.

Snell v. Chicago, 152 U. S. 191, 14 S. Ct. 489, 38 L. Ed. 408.

A Federal question does not arise where the claim is made that a state statute is inconsistent with the power of Congress to regulate commerce throughout the states, and the highest court of the state holds that the statute was intended to apply and applied only to domestic transportation.

Erie R. Co. v. Purdy, 185 U. S. 148, 22 S. Ct. 605, 46 L. Ed. 847.

The construction given a state statute by the highest court of the state will as a general rule be followed by the Supreme Court in determining its jurisdiction to consider a case on the ground that a Federal right is involved.

Baccus v. Louisiana, 232 U. S. 334, 34 S. Ct. 439, 58 L. Ed. 627.

The Federal Supreme Court when dealing with the constitutionality of state statutes challenged under the Fourteenth Amendment to the United States Constitution accepts the meaning of such statutes as construed by the highest court of the state.

Farncomb v. Denver, 252 U. S. 7, 40 S. Ct. 271, 64 L. Ed. 424.

The general rule of decision is that this court will follow the adjudication of the highest court of a state in the construction of its own statute.

McElvaine v. Brush, 142 U. S. 155, 12 S. Ct. 156, 35 L. Ed. 971.

The Federal Supreme Court will adopt state courts' construction of state tax law.

Saltenstall v. Saltenstall, 276 U. S. 260, 48 S. Ct. 225, 72 Fed. 525.

The action of a state comptroller in determining for the purpose of taxation the amount of capital stock of a foreign corporation incorporated within the state does not appear a Federal question.

New York State v. Roberts, 171 U. S. 658, 19 S. Ct. 58, 43 L. Ed. 323.

While not controlling, the opinions of the state trial supreme court that no Federal question exists are entitled to considerable weight and respect.

The certificate of the chief justice and the order allowing the appeal is not determinative in regard to the existence of a Federal question.

Rector v. City Deposit Bank Co., 200 U. S. 405, 26 S. Ct. 289, 50 L. Ed. 527.

There should be some limitation upon the rule established in *King Mfg. Co. v. Augusta*, 277 U. S. 100.

It is respectfully urged that if some attention is not given to the views expressed by the dissenting justices in this last mentioned case, the United States Supreme Court will be the ultimate tribunal of all controversies involving municipal ordinances, administrative orders, and tax adjudications.

WHEREFORE, Respondent respectfully submits that the Supreme Court of the United States deny jurisdiction upon appeal to review the judgment in this suit.

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(2778)

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CHARLES ELMORE CROPLEY
CLERK

IN THE
**Supreme Court of the
United States**

October Term 1939

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellant,

VS.

STATE OF MINNESOTA,

Appellee.

APPEAL FROM THE SUPREME COURT OF MINNESOTA

BRIEF OF APPELLEE.

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IN THE
**Supreme Court of the
United States**

October Term 1939

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,

Appellant,

VS.

STATE OF MINNESOTA,

Appellee.

APPEAL FROM THE SUPREME COURT OF MINNESOTA

BRIEF OF APPELLEE.

OPINIONS BELOW.

The first appeal was taken only by the State of Minnesota. *State v. Illinois Central Railroad Company*, 200 Minn. 583, 274 N. W. 828, affirmed in part and reversed in part with directions. Rehearing denied, 275 N. W. 854.

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The second appeal was taken by the Illinois Central Railroad, 205 Minn. 1, 284 N. W. 360. There the state only appealed on the matter of the allowance of interest and penalty. Affirmed as to both appeals. The third appeal, by the company, resulted in affirmance of the judgment against it for \$28,157.95. 205 Minn. 621, 286 N. W. 359.

STATEMENT OF CASE:

This action relates to the inclusion under the railroad gross earnings tax law, Mason's Minnesota Statutes of 1927, Sections 2246 to 2249 inclusive, of the Minnesota proportion of the credit balances from car rental receipts of appellant railway company but not reported by it for the years 1922 to 1929, inclusive, and claimed by the state to be part of its gross earnings and to be treated as such for taxation purposes.

Freight cars pass out of the control and possession of the owning carriers and are hauled by and over the lines of other carriers. Thus the owners are deprived of their use for weeks and months at a time.

To adjust their rights among themselves, the railway companies adopted a practice sanctioned by the Interstate Commerce Commission, by which the owner of the cars diverted to the use of some other carrier is credited and the user is charged with an aggregate amount of one dollar per day per car during such time as such cars are out of the possession of the railroad owning such cars. Accounts are kept and charges adjusted under an agreement between the various railroads on the basis of which the number of days each freight car owned by one railroad is in the possession of another and balancing between the

railroads their respective per diem debits and credits, offsetting car-day for car-day on a reciprocal basis. Where any car account between two railroads balances, there is no payment of money, but any excess of car days in favor of either road is settled on the basis of one dollar per car per day.

It is these moneys or credits so received by appellant for car rentals, so far as they reflect Minnesota operations, that were sought to be taxed by this action.

The method of taxing railroad property by the so-called gross earnings tax began in Minnesota while it was yet a territory. Prior to 1908 car rental credit balances, such as there were, had not been considered as gross earnings, but in *State v. M. & I. Ry. Co.*, 106 Minn. 176, 118 N. W. 679, 1007, in speaking on this subject for the first time, and where only a Minnesota intrastate road was concerned, the court said:

"Where accounts are kept between different companies and charges are adjusted for such service, up to the point where the account's balance, the operation is a mere exchange of the use of the cars, but the amount received by any company for the use of its cars in excess of the amount paid out by it for the use of the cars of other companies is *one of its sources of revenue earned by its rolling stock*, and should be included in the gross earnings." (Italics ours.)

Thereafter reports of such income were required and became a basis for fixing the tax, to which the railroads all agreed until the decision in *State v. Great Northern Ry. Co.*, 163 Minn. 88, decided in 1925, in which action the gross earnings tax for the year 1922 so far as it related to car rentals was contested.

Railroad companies can get the actual figures showing the periods of time when a foreign car is on their line, but they contend it would be expensive (R. 47); so in order to accommodate them the state has consented to the computation of its proportionate share of the taxable credit balances on the basis of a formula, although at all times the state has been and now is ready and willing to accept actual figures.

From the time of the decision in *State v. M. & I. Ry. Co.*, supra, decided in 1908 and until the year 1921, all railroads operating in Minnesota paid a gross earnings tax on the Minnesota proportion of any car rental credit balance. This balance was determined during such period by placing in one account all receipts and disbursements from all railroads, whether operating in Minnesota or not, and if said account carried as stated showed a credit balance, then there was apportioned to Minnesota that amount or percentage thereof that reflected the ratio or percentage that the Minnesota loaded car miles or revenue car miles bore to the loaded car miles of the entire system of the tax-reporting railroad. This method of determining the gross earnings tax upon car rental receipts or income was agreed to, complied with, and apparently satisfactory to all parties involved until contested in *State v. Great Northern Ry. Co.*, supra. The holding there, and so far as now pertinent, was to the effect that railroads were not required to place in such car rental account any receipts or disbursements received from or made to railroads not physically operating in the State of Minnesota. Following the decision in *State v. Great Northern Ry. Co.*, supra, there was uncertainty as to the proper method of calculat-

ing or computing the proper proportion of credit balances allocable to Minnesota from interstate carriers who physically operated a portion of their road in Minnesota.

In 1933 suit was commenced by the state against several railroads to collect gross earnings taxes upon credit balances. Among such railroads was the Chicago, Burlington and Quincy Railroad. These suits were settled, and during the settlement thereof the so-called "Burlington formula" was devised for the purpose of calculating the Minnesota proportion of credit balances. Subsequent to the commencement of the aforementioned suits, but prior to their settlement, suit had been commenced against the appellant herein. At the first trial the court adopted neither the method of calculation of the state nor the one suggested by the defendant Illinois Central but devised one of its own, based chiefly upon an average percentage of the Minnesota proportion.

About that time the settlement with the other railroads¹ was made upon the basis of the "Burlington formula", and the state in this case in a motion for amended findings asked the court to adopt the "Burlington formula". This the court refused to do, and the case went to the Minnesota Supreme Court on the state's appeal only. The case was remanded back to the trial court for the application of the "Burlington formula," which was applied and the additional tax without certain interest or penalty was awarded the state.

This decision was then appealed by the Illinois Central Railroad and also by the state, but by the latter only on the question of certain interest and penalty. The decision of the trial court was affirmed, and the case was again

remanded to the trial court for the formal entry of judgment, and a third appeal was taken therefrom by the Illinois Central Railroad; and the judgment was affirmed by the state Supreme Court.

SUMMARY OF ARGUMENT.

I. The appellant railroad company may not in this appeal challenge the taxability of credit balances for the following reasons:

A. It acquiesced in the inclusion of said credit balances for gross earnings tax purposes, since 1908, which is tantamount to a practical construction of the statute and is the construction given it by the state and the courts.

B. Question not sufficiently raised by the pleadings.

C. If raised by the pleadings, it was not considered or adopted by the court or the parties as the theory of the case.

D. 1. Such a defense was abandoned when the railroad company failed to appeal after the first trial.

2. By failure to urge such a defense in its assignment of errors when it appealed from the court's decision after the second trial.

E. Question not properly raised by the assignment of errors in the appeal to this court.

U. S. v. Burlington, etc. R. R. Co., 98 U. S. 334, 342;

U. S. v. Hammers, 221 U. S. 220, 225;

Schell's Executors v. Fauche, 138 U. S. 562, 572;

Storaasli v. Minn., 283 U. S. 57;
 Millsaps College v. City of Jackson, 275 U. S.
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 Johnston v. Ouachita, etc., 40 Fed. (2) 604;
 United, etc. v. West, 280 U. S. 234;
 Boston, etc. v. Bjornquist, 248 U. S. 573;
 Dunnell's Minn. Digest, Section 401;
 4 C. J. S., Section 241, page 465;
 Decennial Digest, Appeal and Error, Sections
 173 (3), 1082 (9), 852, 882;
 Steward v. Nutrena Feed Mills, 186 Minn.
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 4 C. J. S., Section 701, page 2608; Section 241,
 page 465; Section 241 (e), page 479;
 Duignan v. U. S., 274 U. S. 195, 200;
 Montana Ry. Co. v. Warren, 137 U. S. 348;
 West v. Rutledge, etc., 244 U. S. 90, 100;
 Southern Ry. Co. v. Kentucky, 274 U. S. 91;
 City, etc. v. Denver Union Water Co., 246
 U. S. 178;
 Johnson v. Langford, et al., 245 U. S. 541;
 St. Paul, etc. v. Kaufman, etc., 303 U. S. 653.

- II. Credit balances or the amount received by a railroad company operating in Minnesota for the use of its freight cars in excess of what it pays for the use of

cars of other companies' cars operating in Minnesota is properly included in taxable gross earnings.

State v. M. & I. Ry. Co., 106 Minn. 176;

State v. McPetridge, 64 Wis. 130, 24 N. W. 140;

State v. Great Northern Ry. Co., 163 Minn. 88,
203 N. W. 453;

Great Northern Ry. Co. v. Minn., 278 U. S. 503,
506;

Cudahy Packing Co. v. Minn., 246 U. S. 450, 452;

Maine v. Grand Trunk Ry. Co., 142 U. S. 217;

Wis. etc. v. Powers, 191 U. S. 379;

Flint v. Stone Tracy Co., 220 U. S. 107;

Postal Telegraph Cable Co. v. Adams, 155 U. S.
698;

Pullman's Palace Car Co. v. Pennsylvania, 141
U. S. 18;

Galveston, etc. v. Texas, 210 U. S. 217;

State v. N. Pacific Ry. Co., 32 Minn. 294, 20 N. W.
234;

State v. St. Paul Union Depot, 42 Minn. 142, 43
N. W. 840;

Hopkins v. So. Cal. Telephone Co., 275 U. S. 393;

Wallace v. Hines, 253 U. S. 66, 69;

Dane v. Jackson, 256 U. S. 589, 598;

Rowley, etc. v. Chicago N. W. Ry. Co., 293 U. S.
102;

State R. R. Tax Case, 92 U. S. 575;

Giozza v. Tiernan, 148 U. S. 657;

American Sugar Refining Co. v. Louisiana, 179
U. S. 89;

Maxwell, etc. v. Bugbee, etc., 250 U. S. 525;

Branson, etc. v. Bush, etc., 251 U. S. 182;
 So. Ry. Co. v. Watts, 260 U. S. 519, 529;
 Bell's Gap R. R. Co. v. Penna., 134 U. S. 232;
 Merchants & Mfg. Bank v. Penna., 167 U. S. 461;
 Magoun v. Ill. Trust and Savings Bank, 170 U. S.
 283;
 Beers v. Glynn, etc., 211 U. S. 477;
 Northwestern, etc. v. Wis., 247 U. S. 132;
 Carmichael v. Southern, etc., 300 U. S. 644.

III. The "Burlington formula" for computing the state's proportion of credit balances from the interchange of freight cars is, for all practical purposes, the fairest and most accurate, and does not impinge upon the limitation of the federal constitution.

Wallace v. Hines, 253 U. S. 66, 69;
 Union Tank Line Co. v. Wright, 249 U. S. 275,
 283;
 Great Northern Ry. Co. v. Weeks, 297 U. S. 135;
 Commonwealth v. Harrisburg, 284 Penna. 175,
 130 Atl. 412;
 Ft. Smith Lumber Co. v. Ark., 251 U. S. 533;
 Davidson v. New Orleans, 96 U. S. 97;
 St. Louis, etc. v. Ark., 235 U. S. 350;
 Cream of Wheat Co. v. Grand Forks, 253 U. S.
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 Citizens National Bank v. Durr, 257 U. S. 99;
 St. Louis S. W. Ry. Co. v. Ark., 235 U. S. 350;
 Hawke v. Smith, 253 U. S. 225;
 Shaffer v. Carter, 252 U. S. 37;

Rowley, etc. v. Chicago N. W. Ry. Co., 293 U. S. 102;

Dane v. Jackson, 256 U. S. 589;

Hans Rees' Sons v. N. Carolina, 283 U. S. 123;

Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 699.

IV. The taxing power of a state is not waived by the nonpayment of either all or part of the tax through mistake of a taxpayer or those charged with the collection of the tax.

Winona, etc. v. Minn., 40 Minn. 512, 41 N. W. 465, 159 U. S. 526;

League v. Texas, 184 U. S. 156;

Kentucky Union Co. v. Kentucky, 219 U. S. 140;

Citizens National Bank v. Kentucky, etc., 217 U. S. 443;

Fla. etc. v. Reynolds, 183 U. S. 471;

Ft. Smith Lumber Co. v. Ark., 251 U. S. 532;

White River Lumber Co. v. Ark., 279 U. S. 692.

V. A. "Statute of any state" under Section 237 of the Judicial Code does not include a method of calculation under a tax formula adopted by an administrative agency of a state, and should only be reviewable by the United States Supreme Court in the exercise of its discretion under a writ of certiorari, rather than as a matter of right by appeal.

Fallbrook, etc. v. Bradley, 164 U. S. 112;

Tracy v. Ginzberg, 205 U. S. 170;

Judicial Code, Section 237.

ARGUMENT.

I. A PRACTICAL CONSTRUCTION OF THE STATUTE WITH RELATION TO THE TAXABILITY OF CREDIT BALANCES FROM THE EXCHANGE OF FREIGHT CARS HAS RESULTED FROM APPELLANT'S PAYMENT OF AND ACQUIESCENCE THERETO FOR A LONG PERIOD OF TIME, AND THE ISSUE OF THE TAXABILITY OF CREDIT BALANCES, HAS NOT BEEN PROPERLY RAISED FOR REVIEW HERE BY THE PLEADINGS OR THE THEORY OF THE CASE; NOR WAS THE COURT BELOW GIVEN AN OPPORTUNITY TO PASS ON SUCH QUESTION.

A. From 1908 to 1933 appellant was content with the interpretation and construction of the gross earnings statute regarding the taxability of credit balances as announced in *State v. M. & I. Ry. Co.*, 106 Minn. 176, and thereafter approved in *State v. Great Northern Ry. Co.*, 163 Minn. 88, 203 N. W. 453. See its brief, page 23, where appellant admits that it acquiesced in the payment of taxes on credit balances since 1908, but states that it did so because the amount computed was negligible, notwithstanding the fact that it physically operated thirty miles of railroad in the choicest part of Minnesota's farming territory and where the density of railroad traffic is very heavy.

It paid what was believed to be the proper tax on such balances and did not even challenge the decision of the first trial court in this case when it awarded the state \$12,866.50.

Acquiescence in the construction given a statute by the government operates in its favor, as against a citizen or taxpayer.

U. S. v. Burlington etc. R. R. Co., 98 U. S. 334, 342

U. S. v. Hammers, 221 U. S. 220, 225

In the case of *Schell's Executors v. Fauche*, 138 U. S. 562, 572, the court said:

"In all cases of ambiguity, the contemporaneous construction, not only of the courts but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

While the Supreme Court is not bound by the characterization given to a state law by the state court, nevertheless it will usually lean toward the construction adopted by the state court of last resort.

Storaasli v. Minn., 283 U. S. 57

Great weight will be given to the decisions of a state court regarding questions of taxation under the constitution or laws of its own state.

Millsaps College v. City of Jackson, 275 U. S. 129

B. Appellant's prayer for relief in its answer (R. 8) objects only to the additional taxes claimed by the state during the years in question. The only place where appellant's pleadings could be taken as opposing any tax on credit balances is contained in paragraph 6 of its answer (R. 5), but the allegations therein do not go to the credit balances.

Issues not set up in answer cannot be raised on appeal.

Georgia Casualty Co. v. Waldman, 53 Fed. (2) 24

Johnston v. Onachita etc., 40 Fed. (2) 604

United etc. v. West, 280 U. S. 234

Even the theory of trial cannot work a broadening of issues made by pleadings.

Boston etc v. Bjornquist, 248 U. S. 573. Petition for writ denied.

C. A careful examination of the record clearly shows that neither of the trial courts nor the parties during the trial considered such a defense as any part of the theory upon which the case was submitted.

The theory upon which a case was tried is controlling on appeal.

Dunnell's Minn. Digest, Section 401; 4 C. J. S. Section 241, page 465

Decennial Digest, Appeal in Error, Sections 852, 882

The rule against shifting position on appeal is applicable to defendant.

Stewart v. Nutrena Feed Mills, 186 Minn. 606, 244 N. W. 813

Illinois Cent. R. Co. v. Egan, 203 Fed. 937, 122 C. C. A. 239; 4 C. J. S., Section 701, page 2608.

Appellant's position with respect to the constitutional questions was definitely stated by counsel at the opening of the second trial when counsel for appellant said to the court: (R. 116) :

"We are here today, if the Court please, for the purpose of permitting the defendant to supplement the

record in this case and urging any defense it may have, constitutional or otherwise, to this Burlington formula * * * .”

The trial court understood that the theory of the case was limited to the question of formula when he stated (R. 181) :

“Here such balances are conclusively presumed income.”

When a cause is brought up for appellate review, a party cannot assume an attitude inconsistent with or different from that taken by him at the trial, and the parties are restricted to the theory on which the cause was prosecuted or defended in the court below. 4 C. J. S., Section 241, page 465. Dunnell's Digest, Section 401.

The same rule governs upon a theory of defense where the parties act upon a particular theory of defense or of opposition thereto. Decennial Digest, Appeal and Error, Section 173 (3), Section 1082 (9).

A party is bound in appellate court by the theory pursued below with regard to the relief sought and grounds therefor, especially where it is inconsistent with the theory at trial. 4 C. J. S., Section 241 (e), page 479.

It is only in exceptional cases where questions not pressed or passed upon below will be reviewed, such as grave questions of public policy or to protect fundamental rights, or where the question did not exist or could not be raised below.

Duignan v. U. S., 274 U. S. 195, 200

Montana Ry. Co. v. Warren, 137 U. S. 348

In the case of *West v. Rutledge, etc.*, 244 U. S. 90, 100, the court said:

"The essential circumstance would seem to be that a review is sought of that which was not decided, not submitted at all or withdrawn from submission and which, if it had been submitted, might have been decided in favor of the appealing party."

D. 1. At the conclusion of the first trial the appellant here (the defendant in the trial court) moved for amended findings (R. 95). An examination of these findings shows that appellant was not challenging the validity of including credit balances for the purpose of gross earnings tax. Its only concern was with the amount. It conceded the taxability of credit balances by asking in a motion for amended findings of fact and conclusions of law that the figures \$137.60 be inserted in the conclusions of law in place of the \$12,866.50. However, it was apparently satisfied with the amount awarded by the court, as appellant took no appeal but contented itself with merely resisting the state's appeal, as to the formula or method of calculation.

If appellant believed that the state's proportion of credit balances from the inclusion of freight cars should not have been included in gross earnings and was not taxable under any formula or in any amount, it should have appealed after the first trial, and not have first moved to amend findings, so as to allow a portion of them and subsequently not to appeal at all.

2. After the conclusion of the second trial, defendant again moved for amended findings (R. 188), and utterly failed to challenge the taxability of credit balances, but

confined itself to opposition to the "Burlington formula." Appellant's assignment of errors after the second trial also failed to challenge the taxability of credit balances and limited the scope of review of the state court to the question of the additional taxes or the formula. Copy of the assignment of errors used below in appellant's brief in the second appeal case, No. 31791, is attached hereto as Appendix "A." If, by the most remote speculation, the taxability of credit balances should be deemed to have been put in issue by the pleadings, it was never pressed by the appellant nor passed upon by the court and was completely abandoned as a defense on issue by appellant.

E. Appellant's assignment of errors in this court (R. 219) do not sufficiently challenge the taxability of credit balances, but go to the formula for computing the proportion of share allocable to the state. The only place where such an issue could be considered under the assignment of errors in this court is in paragraphs 7 and 8 of the same (R. 220). There the objection seems to be linked to the formula. Here for the first time this issue is dragged in by the coat-tails as a part of the objection to the formula, but if so it may not be raised in this court after having never been in issue in the court below.

"If the contention made below differs from the contention made here to such a degree that the decision upon one would not necessarily conclude the other, the raising of one below will not permit the raising of the other here, even if the same provision of the Constitution be the basis of both claims."

So. Ry. Co. v. Kentucky, 274 U. S. 91

A party cannot on appeal set up new grounds of defense not raised, and relied upon in the lower court.

United etc. v. West, 280 U. S. 234

City etc. v. Denver Union Water Co., 246 U. S. 178

Johnson v. Langford et al., 245 U. S. 541

St. Paul etc. v. Kaufman etc., 303 U. S. 653

II. UNDER THE STATUTES AND DECIDED CASES, CAR RENTAL CREDIT BALANCES ARE TAX- ABLE AS GROSS EARNINGS.

In *State v. M. & I. Ry. Co.*, supra, the court followed the view taken by the Supreme Court of Wisconsin in *State v. McFetridge*, 64 Wis. 130, 24 N. W. 140, and held that all income or earnings "from sources incidental to the transportation business" received by the railway company should be included within the term "gross earnings." The court held that as to *State v. St. Paul M. & M. Ry. Co.*, 30 Minn. 311, 15 N. W. 307, it was not conclusive upon the broader questions not then involved in that decision, and the court went on to state:

"The operation of a railroad is not necessarily restricted to operating trains upon railway tracks. We believe it to have been the purpose of the legislature to require railroad companies to pay into the state treasury the stated percentage of the amount of earnings received in connection with all operations reasonably within the powers conferred upon them by the corporate acts. Such companies are organized and conducted primarily for transportation purposes, but they receive a considerable income from other sources incidental to the transportation business, though not directly from the operation of trains. We believe the

proper meaning of the act under consideration to be that, when a railroad company is engaged in work reasonably within its charter powers, the receipts from such sources constitute gross earnings in the operation of the railroad. * * *

Under the foregoing decision credit balances upon all roads operating in Minnesota were taxed. Subsequently the court decided in *State v. Great Northern Ry. Co.*, 163 Minn. 88, 203 N. W. 453, that Minnesota railroads were not required to place in such car rental account any receipts or disbursements received from or made to railroads not physically operating in Minnesota. In this case the court said:

"If it is upon an interstate road, only so much of the rental as is properly applicable to Minnesota may be considered.' In other words, the statute directs, if car rentals are to be considered gross earnings, that *the cars must have been used in operations within the state or upon railways running into the state so that the use within the state may be found by apportionment.* This avoids the stigma of double taxation and avoids any appearance at attempts to tax interstate commerce."

The gross earnings tax upon railroads is in lieu of all taxes upon all of their property within the state. The tax thus levied is a property tax based on the gross earnings fairly attributable to the property of the railway company within the state.

Great Northern Ry. Co. v. Minn., 278 U. S. 503, 506
Cudahy Packing Co. v. Minn., 246 U. S. 450, 452

Credit balances are but one of twenty-six items included in the computation of railroad gross earnings taxes (R.

76A), and as an integral part of the whole railroad property reflect its value, not merely the value of the freight cars but of the whole railroad under the rule applicable to unitary enterprises.

The second trial court, after stating that the question of credit balances was not a matter at issue and that they were conclusively considered income, very aptly stated that to omit such balances would violate the constitutional uniformity and equality requirements, when it said (R. 181):

"If freight car per diem balances were omitted altogether, then a railroad having no such balance in its favor would have its tax measured by its entire income while a railroad whose freight car per diem balance amounted to one-third or one-half or three-fourths of its gross income would have its tax measured by two-thirds or one-half or one-fourth of its gross income."

A state may measure a tax by receipts which come partly from business of an interstate nature.

Maine v. Grand Trunk Ry. Co., 142 U. S. 217

Wis. v. Powers, 191 U. S. 379

A tax upon a property may be measured in part by income from property not in itself taxable.

Flint v. Stone Tracy Co., 220 U. S. 107.

The right to tax property used in interstate commerce is well settled.

Postal Telegraph Cable Co. v. Adams, 155 U. S. 698

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18

If it is a legitimate attempt to exercise a taxing power of the state and not imposing a burden on interstate commerce, it is not invalid.

Galveston etc. v. Texas, 210 U. S. 217

In the Galveston v. Texas case, supra, Justice Holmes said:

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

The inclusion of credit balances for the purpose of a gross earnings tax is to measure value of the Minnesota property of this appellant as a going concern or unitary enterprise. In order to successfully challenge the tax itself or the formula, appellant would have to show evidence of value. This it has utterly failed to do. Nowhere does the record contain any such evidence. The second trial court said apropos the question of value and the record (R. 182):

"There is no evidence in the record to which the attention of the Court has been directed or which it has found from which it may be inferred that the resulting total tax for these years is so unrelated to an ad valorem tax as to destroy its character as a lien tax."

And again (R. 183):

"The record does not sustain any inference that the resulting tax is not related reasonably to an ad valorem tax or results in a tax discriminatory as to the defendant."

Taxes paid by other railroads mean nothing unless values are shown. Value must be shown to void a tax as arbitrary.

Rowley v. Chicago N. W. Ry. Co., 293 U. S. 102

Undervaluation of property of the same class belonging to others is not discrimination unless it is intentional and systematic.

So. Ry. v. Watts, 260 U. S. 519, 526

The use by other railroads of rolling stock or freight cars is an asset to a railroad company. Where it has cars of its own which are exchanged for an equal number of another company's cars, there is no increment by reason of the exchange accruing to either company; but when one company receives more cars than another, then credit balances from per diem earnings accruing to the company which owns the cars are a part of the income of such company and enhance its value.

It is difficult to believe that the some thirty railroads in Minnesota would have submitted to the inclusion of credit balance items for taxation purposes for more than twenty-five years, and all but one would now be satisfied with it, if any serious question as to its constitutionality existed.

There has been no increase in the gross earnings tax since 1912, while the millage rate for ad valorem purposes on other property has increased from an average of 27 mills to 83 mills. Minnesota is one of the states imposing the least onerous of tax burdens upon railroads. For a discussion of railroad taxation in Minnesota, see Taxation in Minnesota, Blakey.

Counsel have cited certain early Minnesota cases in support of their contention that credit balances in any amount are not taxable.

State v. St. Paul M. & M. Ry. Co., 30 Minn. 311, 15 N. W. 307.

State v. Northern Pacific Ry. Co., 32 Minn. 294, 20 N. W. 234

State v. St. Paul Union Depot Co., 42 Minn. 142, 43 N. W. 840

These cases are not in point with appellant's position. The "St. Paul" case involved an attempt to tax an annual track rental. There the court said:

"Rental or compensation paid to the company for the right to operate the railroad cannot be called receipts on account of the application of it. The company might not operate its railroad at all, but lease it for a gross sum, in which all the receipts on account of the operation of the railroad would go into the hands of the lessee, and the rent only (which would probably be regulated by the expectancy of net earnings) into the hands of the company."

In the "Northern Pacific" case the court held that revenue from the operation of a leased line was subject to the gross earnings tax.

In the "St. Paul" Union Depot" case the state attempted to impose a gross earnings tax on the depot company's revenue, for which it was held not liable inasmuch as all of its revenue was divided among the railroads which owned it, and they in turn paid a gross earnings tax upon it. This case is almost identical with Hopkins v. Southern Cal.

Tel. Co. 275 U. S. 393, which appellant cites in support of its contention. In both of these cases the state attempted to impose another tax upon the property or income of another company which was renting property to the complaining taxpayer. In the instant case the complaining company is objecting to the inclusion of money which it receives for rentals or credit balances from property it owns.

Appellant contends that revenue from the use of these cars for hauling freight is taxed in the hands of the other railroad. That is true, but appellant receives earnings from these cars on a per diem basis regardless of whether they are loaded or empty. The income received by the owning company, in this case the appellant, would escape taxation altogether and particularly while the cars are empty, if credit balances were not included.

On page 25 of appellant's brief it admits that credit balances have a relation to value, *if they are figured in a manner to its liking*, so there is no purpose in refuting its claim that the state has admitted through its corporate examiner the contrary (R. 151). Credit balances are either taxable as gross earnings or they are not. It cannot depend upon degree or amount to establish their validity. It is difficult to believe that anyone could contend in one breath that an item is wholly untaxable under any formula and to do so is palpably discriminatory, whimsical, capricious, arbitrary and unreasonable because it bears no relation to value; and then naively admit that if the tax is computed under the formula it suggests so as to produce a negligible tax, there would be no objection to it.

NO IMPORTATION OF VALUE IN TAXATION OF CREDIT BALANCES.

No property belonging to appellant which is not used in the State of Minnesota is taxed under the "Burlington formula," because the factor of allocation is confined to the extent of the use of the cars in Minnesota. The reporting or owning road's Minnesota proportion of its own mileage is irrelevant, as the extent of its mileage does not determine the extent of the use of its rolling stock, as that is used on many other lines which operate in Minnesota. However, it is permissible for a state to look beyond its borders in order to ascertain the value of the property within its borders where the unit rule is applicable, as it is in the matter of railroad systems.

"The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they would otherwise possess."

Wallace v. Hines, 253 U. S. 66, 69

A state tax law will not be held to conflict with the Fourteenth Amendment unless it is flagrantly and palpably unequal and so discriminatory and arbitrary as to amount to taking property without compensation.

Dane v. Jackson, 256 U. S. 589, 598

There the court said:

"* * * the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in pro-

portion to payment made, as will be returned to every other individual or class, paying a given tax, it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the States for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state legislatures. * * *

Railway valuations are not capable of arithmetical calculation and not governed by any fixed and definite rule.

Rowley etc. v. Chicago N. W. Ry. Co., 293 U. S. 102.

All railroads operating in Minnesota include credit balances among their gross earnings. Some roads have much of their mileage within the state and therefore accumulate a larger Minnesota proportion of credit balances because they are using freight cars of other companies more in Minnesota, while railroads with a small amount of mileage accumulate a smaller Minnesota proportion of debit balances. This is not a defect of the tax or formula but is occasioned entirely by the extent of each particular railroad's operation within the state. It is enough if there is no discrimination within the same class.

Giozza v. Tiernan, 148 U. S. 657.

American Sugar Ref. Co. v. Louisiana, 179 U. S. 89.

Maxwell etc. v. Bugbee, etc., 250 U. S. 525.

Branson etc. v. Bush etc., 251 U. S. 182.

So. Ry. Co. v. Watts, 260 U. S. 519.

The Fourteenth Amendment does not compel states to adopt an iron rule of equal taxation.

Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232.

Merchants & Mfg. Bank v. Pennsylvania, 167 U. S. 461.

Magoun v. Ill. Trust and Savings Bank, 170 U. S. 283

Beers v. Glynn, etc., 211 U. S. 477

Northwestern etc. v. Wisconsin, 247 U. S. 132

Carmichael v. Southern etc., 300 U. S. 644

The only requirement of uniformity is that it operate the same upon all in any one class.

State R. R. Tax Case, 92 U. S. 575

III. THE BURLINGTON FORMULA FOR COMPUTING THE "STATE'S PROPORTION" OF CREDIT BALANCES FROM THE INTERCHANGE OF FREIGHT CARS IS FOR ALL PRACTICAL PURPOSES THE FAIREST AND MOST ACCURATE AND DOES NOT IMPINGE UPON THE LIMITATIONS OF THE FEDERAL CONSTITUTION.

The appellant and other railroads ever since formulas have been applied to Minnesota car rental operations have maintained that while physically possible to submit actual figures the prohibitive cost of doing so made it impracticable. Under the statutes and decided cases the state would have had no alternative but to accept actual figures had the railroads submitted them. In an effort to be fair and reasonable and cooperate with the railroads the state has applied a formula for the allocation and computation of the Minnesota proportion of the earnings from the hire of freight equipment or the credit balances accruing to the railroads from such interchange of equipment. The data available to the state taxing authorities to calculate the

Minnesota proportion of credit balances were certain definite figures of every railroad, namely

- (a) rentals from other lines for use of cars (Column 1, R. 87-94)
 - (b) payments to other lines for use of cars (Column 2, R. 87-94)
 - (c) system loaded freight car miles (See (e) below)
 - (d) Minnesota loaded freight car miles (See (e) below)
 - (e) Minnesota percentage of loaded freight car miles (Columns 2 and 5, R. 87-94, inclusive). This is the ratio of (d) to (c) above and admittedly correct.
- Therefore the divisor (c) and the dividend (d) referred to above are likewise admittedly correct.

All the foregoing quantities were capable of accurate ascertainment and correct results were obtainable therefrom.

The taxing authorities were confronted by the problem of collecting a gross earnings tax upon car rental credit balances which reflected "use within the state" and as determined by figures available and the application of a formula which would "afford the nearest known approach to accuracy and to furnish as close as possible a mathematically correct result."

Never at any time was the Minnesota proportion of a gross earnings tax on car rentals measured or ascertained by anything other than the Minnesota percentage. With this in mind the state taxing authorities adopted and applied to the available figures its formula, which has sometimes been described as the "state's formula."

DEFINITIONS.

Definition of terms and explanation of formulas are as follows:

a. "Loaded freight car miles" mean the same thing as "revenue freight car miles" or "net revenue car miles," and are referred to for the purpose of brevity as "mileage."

b. "Minnesota percentage" is the percentage that the total loaded freight car miles in Minnesota bear to the total loaded freight car miles of the entire system of the railroad during any year. (i. g. If the total loaded freight car miles of the entire system was 1,000,000, and 100,000 thereof was in Minnesota, the "Minnesota percentage" would be ten per cent.)

c. "Minnesota proportion" is the result of applying the Minnesota percentage to a given sum or sums.

d. "System" as used herein, means the entire aggregate mileage of any railroad involved.

e. "Car rentals" as used herein means a \$1.00 per diem charge for freight cars of the aggregate sum or sums of such per diem charges.

f. "Home car" is a car on the road to which it belongs.

g. "Foreign car" is a car on a road to which it does not belong.

h. "State" or "state taxing authorities" or their "respective equivalents" mean those state officials charged with the computing and collecting the gross earnings tax.

i. "Road" as used herein may mean a railroad, lines, a railway, railway lines, or a carrier.

j. Reference to any road, railroad, railway, railway lines, carrier or lines, unless otherwise specifically indi-

cated, refers only to such as are operating roads within the state of Minnesota.

k. "Using road" is that road which had possession of cars not belonging to it.

FORMULAS.

STATE'S FORMULA.

The state's formula consisted of applying the Minnesota percentage of the using road to the several and separate car rental receipts and disbursements of the appellant with the other roads with which it had car rental relations, then totaling in separate columns, the Minnesota proportion of such receipts and disbursements so arrived at, then striking a balance of such totals, and if a credit balance, imposing a gross earnings tax thereon. This formula was adopted subsequent to the decision in *State v. Great Northern Ry. Co.*, supra, and was the one upon which suit was originally brought in this action. During the first trial appellant urged adoption of a formula which was identical with the formula used by the state prior to the *Great Northern* decision with the exception of including per diem rentals from railroads not physically operating in Minnesota. However it subsequently abandoned that position and in a motion to again amend its answer set up another formula which it urged the court to adopt. This formula was incorporated in the answer as paragraph XIII and is based upon track mileage (R. 118).

The only change in the state's position has been in the application of the Minnesota percentage of the using line's

freight car miles to the system balance instead of applying it directly to rentals or payments, while the appellant has shifted from a modified version of the state's old formula to a "track mileage" formula.

The "track mileage" formula as a basis of figuring valuation or computation of earnings of any nature has been thoroughly discredited by numerous decisions including those of this court. Track mileage does not take into account density of traffic and numerous other factors.

Wallace v. Hines, 253 U. S. 66, 69;

Union Tank Line Co. v. Wright, 249 U. S. 275, 283;

Great Northern Ry. Co. v. Weeks, 297 U. S. 135.

BURLINGTON FORMULA.

The "Burlington formula" is identical with the state's formula in all respects, except that system balances are struck in the first instance, and then the Minnesota percentage of the using road is applied to such system balances, be they credit or debit of the individual carriers, and not to system receipts and disbursements. In any and every instance, and under any and all circumstances, the Minnesota percentage of the using road is employed in determining the Minnesota proportion of car rental charges.

Appellant objects strenuously to applying the Minnesota percentage of the using road's loaded car miles to credit balances. This contention was most effectively disposed of in Justice Stone's opinion (R. 102) when he said:

"The application, for present purposes of that percentage (appellant's) to its own net system credit balances is indefensible for the simple reason that it

helps not at all in ascertaining the amount of car rentals earned by defendant's cars in use by other roads in Minnesota. Plainly for that purpose, the factor of allocation must be the extent of the use of the cars in Minnesota. The reporting or owning road's Minnesota proportion of its whole mileage is in consequence irrelevant; and the Minnesota proportion of the using road's determinative."

Appellant further objects to the application of the Minnesota percentage of the using or reporting road's Minnesota proportion of mileage for the computation of debit balances. With reference to that the court said (R. 104):

"What we must somehow determine, as nearly as may be, is the amount of money derived from the use of cars in Minnesota. On that question, what has been paid for such use in other states has no bearing. Hence, in any such computation or formula, defendant should not have credit for the whole of its debit balances. It is entitled only to allowances for the portion of such balances properly chargeable to Minnesota. Defendant is taxable only on rentals for the use in Minnesota of its cars. Therefore, of receipts for allocation to Minnesota, no reductions can properly be made of sums it has paid other lines for use of their cars outside Minnesota."

Appellant is oblivious to anything but the length of its trackage in Minnesota and ignores the large amount of its rolling stock which is used by other roads in Minnesota. It is only natural that railroads with a large mileage in Minnesota use a larger number of other companies' freight cars in Minnesota and therefore have larger debit balances, while roads with a comparatively short mileage with much rolling stock have more of their cars on other companies'

lines, particularly in Minnesota. This may no more be helped than that two manufacturing concerns with approximately the same plant equipment and the same gross earnings could be paying entirely different income taxes by reason of one plant's having a greater cost of operation. Even a comparable track mileage does not mean roads should pay similar or equal taxes.

DOUBLE TAXATION.

Appellant contends that the application of the "Burlington formula" results in double taxation. Double taxation has been defined as follows:

"So far as double taxation is concerned, it exists only where there is 'the taxation twice by the same taxing power of what was regarded as the same subject,' and, it may be added, the same kind of tax."

Commonwealth v. Harrisburg, 284 Penna. 175,
130 Atl. 412.

The taxability of credit balances as contended for in this action under the "Burlington formula" does not come within this definition in any respect.

The Fourteenth Amendment no more forbids double taxation than it does doubling the amount of the tax, short of confiscation.

Ft. Smith Lumber Co. v. Ark., 251 U. S. 533.

Exemption from double taxation by one and the same state is not guaranteed by the Fourteenth Amendment. Much less is taxation by two states upon identical or close-

ly related property interests falling within the jurisdiction of both forbidden.

Davidson v. New Orleans, 96 U. S. 97;

St. Louis, etc. v. Ark., 235 U. S. 350;

Ft. Smith Lumber Co. v. Ark., 251 U. S. 532;

Cream of Wheat Co. v. Grand Forks, 253 U. S. 325;

Citizens National Bank v. Durr, 257 U. S. 99.

A tax that is not based on an arbitrary discrimination is not objectionable because it is a double or unequal tax.

St. Louis S. W. Ry. Co. v. Ark., 235 U. S. 350;

Hawke v. Smith, 253 U. S. 225.

In the case of *Shaffer v. Carter*, 252 U. S. 37, the court said:

"Nor even if the effect of this is akin to double taxation, can it be regarded as obnoxious to the Federal Constitution for that reason, since it is settled that nothing in that instrument or in the Fourteenth Amendment prevents the States from imposing double taxation, or any other form of unequal taxation, so long as the inequality is not based upon arbitrary distinctions."

ALLOCATION.

Where it is necessary or desirable to resort to a formula, it is not necessary that the calculation result in perfect mathematical exactitude. The formula which for practical purposes is the fairest and approximately the most accurate under the circumstances will be deemed sufficient.

Rowley, etc. v. Chicago N. W. Ry., supra.

It is impossible to devise a system of taxation which will distribute the tax burden perfectly in accord with every circumstance.

Dane v. Jackson, supra.

Allocations need only be arrived at by the exercise of sound judgment based on the facts.

Great Northern Ry. Co. v. Weeks, supra.

Evidence which merely discloses negligible criticisms in allocation of income as are inseparable from the practical administration of a taxing system in which apportionment with mathematical exactness is impossible is not sufficient to invalidate a tax.

Hans Rees' Sons v. No. Carolina, 283 U. S. 123.

A tax within the power of a state will not be overthrown because it works a hardship, particularly in isolated instances.

Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692, 699.

IV. THE TAXING POWER OF A STATE IS NOT WAIVED BY THE NONPAYMENT OF EITHER ALL OR PART OF A TAX THROUGH MISTAKE OF A TAXPAYER OR THOSE CHARGED WITH THE COLLECTION OF THE TAX.

Appellant has sought to bring the application of the "Burlington formula" to its receipts and disbursements on the interchange of freight car equipment within the limitation upon permissible retroactivity placed upon legisla-

tion imposing new tax burdens. The state is not attempting to levy new or additional taxes but only the collection of the proper amount due under legislation which has been in effect for many years. In the case of *Winona, etc. v. Minn.*, 40 Minn. 512, 41 N. W. 465, affirmed in 159 U. S. 526, Justice Mitchell said:

"The grand fallacy in this argument is in assuming that statutes like the one under consideration are acts authorizing *original* taxation. The tax was a debt or liability which the land owed in the year when it ought to have been assessed. Such statutes are purely remedial in their nature, and only go to confirm pre-existing rights by adding to the means of enforcing existing obligations. And it can hardly be necessary at this day to argue that wherever property has escaped payment of its share of the public burdens it is competent for the legislature to provide for its assessment or reassessment for back years, and for that purpose it may adopt any method which it might have originally adopted for the enforcement of the collection of taxes. There is no difference in principle between a case where property has escaped taxation by reason of its entire omission from the assessment-rolls and a case where it has escaped by reason of defects in attempted proceedings for the enforcement of the tax. In either case the debt or liability for its share of the public burdens remains, and it may be ascertained and enforced in any subsequent year; and the owner cannot object to any particular method adopted for that purpose, provided it operates equally and justly. The principle of all the cases is that the taxing power, when acting within its legitimate sphere, is one which knows no stopping-place until it has accomplished the purpose for which it exists, viz., the actual enforcement and collection from every lawful object of taxation of its

proportionate share of the public burdens; and, if prevented by any obstacles, it may return again and again until, the way being clear, the tax is collected.

• • •
 "It is elementary that time never runs against the state unless there is an express provision or necessary implication to that effect."

Justice Brewer in his opinion said:

"For this statute rests on the assumption that generally speaking all property subject to taxation has been reached and aims only to provide for those actions which may happen under any system of taxation, in consequence of which here and there some item of property has escaped its proper burden; * * *. At any rate, if it did so, it would violate no provision of the Federal Constitution, and whether it did so or not was a matter to be determined finally by the supreme court of the state."

However, even if we proceed upon the theory that the element of retroactivity exists, such laws imposing taxes or providing remedies for their assessment and collection and not impairing vested rights are not lacking in due process. A state may adopt new remedies for the collection of taxes and apply such remedies to taxes already delinquent without violating the federal constitution.

League v. Texas, 184 U. S. 156.

Kentucky Union Co. v. Kentucky, 219 U. S. 140.

It is no denial of due process for a state statute to subject to taxation property which has escaped in prior years if an opportunity to question the validity or the amount be given, nor to provide a new remedy for a tax liability imposed by a prior law.

**Citizens National Bank v. Kentucky, etc., 217 U. S.
443.**

In the instant case there was no new legislation, only the discovery that the proper method for computing credit balances was not being used subsequent to 1922, when the Great Northern case was commenced and the decision therein handed down in 1925. During the pendency of this action all railroads, including appellant, knew that it was highly probable that a new method of calculating gross earnings taxes on the interchange of freight car equipment was possible. The correctness of gross earnings reports cannot be ascertained immediately upon their filing in order to determine the accuracy of the same or whether all earnings have been properly returned. There are about thirty railroads operating as such in the State of Minnesota and the corporate examiner must check the books of the company. Sometimes it is several years before this may be done. Matters which cannot be settled and require litigation require sometimes several years. This case was commenced about five years ago.

There is nothing in the federal constitution which forbids a state from reaching backward and collecting taxes from certain kinds of property which were not at the time collected through lack of statutory provisions therefor, or in consequence of a misunderstanding as to the law, or from neglect of administrative officials.

Fla. etc. v. Reynolds, 183 U. S. 471;

Fort Smith Lumber Co. v. Ark., 251 U. S. 532;

White River Lumber Co. v. Ark., 279 U. S. 692.

V. A "STATUTE OF ANY STATE" UNDER SECTION 237 OF THE JUDICIAL CODE DOES NOT INCLUDE A METHOD OF CALCULATION UNDER A TAX FORMULA ADOPTED BY AN ADMINISTRATIVE AGENCY OF A STATE, AND SHOULD ONLY BE REVIEWABLE BY THE UNITED STATES SUPREME COURT IN THE EXERCISE OF ITS DISCRETION UNDER A WRIT OF CERTIORARI, RATHER THAN AS A MATTER OF RIGHT BY APPEAL.

It was never intended that the United States Supreme Court should as a result of the Fourteenth Amendment be transformed into a court of appeal where all decisions of state courts involving merely questions of general justice and equitable considerations should be submitted to that court for its determination.

Fallbrook, etc. v. Bradley, 164 U. S. 112;

Tracy v. Ginzberg, 205 U. S. 170.

Questions arising over the interpretation of state laws do not give rise to a federal question, provided that the law as interpreted does not violate due process.

When Congress removed the clause "or an authority exercised under any state" from Section 237 of the Judicial Code, it was clearly its purpose to remove the right to "appeal" to this court from decisions of state courts involving the validity of municipal ordinances, commission orders, and rules adopted by a university, except by writ of certiorari. The meaning of "statute of any state" should be

confined to a statute or law directly passed by the legislature of the state.

The argument and authorities cited in appellee's statement opposing jurisdiction and motion to dismiss are again urged upon the Court for consideration.

CONCLUSION.

1. The appellant may not in this appeal challenge the taxability of credit balances.

2. Credit balances are properly included as taxable gross earnings under the Minnesota statute.

3. The so-called "Burlington formula" for calculating the state's proportion of credit balances from the interchange of freight cars is for all practical purposes the fairest and most accurate and does not violate the federal constitution.

4. The federal constitution does not forbid the collection of back taxes which were omitted through mistake as to the law or the application of a faulty formula.

5. A tax formula is not a "statute of any state" within the meaning of Section 237, Judicial Code.

Respectfully submitted,

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APPENDIX "A"

ASSIGNMENT OF ERRORS.

APPELLANT'S BRIEF.

STATE OF MINNESOTA.

IN SUPREME COURT.

No. 31791

ILLINOIS CENTRAL R. R. CO., APPELLANT.

VS.

STATE OF MINNESOTA, RESPONDENT.

1. The court erred in making the first finding of fact: "That the application of the Burlington formula does not violate the constitutional rights of the defendant."

2. The court erred in its second finding of fact: "That the track mileage formula offered by the defendant is not a better formula than the Burlington formula."

3. The court erred in making its third finding of fact that there is due from defendant for the years in question, in addition to the taxes it paid and in addition to the balance which its Corporation Examiners found to be due after audit, the sum of \$26,414.59.

4. The court erred in its conclusion of law that the State of Minnesota is entitled to recover from defendant the sum of \$26,414.59, with interest at the rate of 6%, and costs.

5. The court erred in holding that the State of Minnesota can constitutionally collect an additional gross earnings tax for the years in question, 1922-1929, notwithstanding the admitted fact that defendant paid its full tax for those years in accordance with the formula duly and regularly prescribed by the State's Tax Commission under specific statutory authority.

6. The court erred in holding that the State of Minnesota can constitutionally require defendant to pay an additional tax on its gross earnings for said years notwithstanding the payment by defendant of the amount found to be due by the State after a complete audit of defendant's accounts of the amount found by the State to be due certified to the State Auditor and collected by the State Treasurer.

7. The court erred in holding that the Burlington formula is a valid and enforceable formula notwithstanding the admitted fact that:

- (a) It was not pleaded;
- (b) It was never adopted by the Comptroller with the approval of the Tax Commission;
- (c) It wholly exempts from the payment of any tax whatever seventeen of the twenty-five railroads in the State, including those doing the most business and having the largest amount of property and the greatest gross earnings.

8. The court erred in holding that defendant's constitutional rights were not violated by the imposition of the *additional tax* after defendant paid the amount due the State in compliance with the formula prescribed by the State and followed by defendant for the years in question and after payment of the additional amount found to be

due upon audit by the State and in holding that the imposition of *such additional tax* and the construction of the Minnesota statute permitting it

(a) Did not deprive defendant of its property without due process of law;

(b) Did not impair the contract between defendant and the State of Minnesota arising from the payment by defendant of the balance found due by the State Public Accountants after statutory audit of defendant's accounts.

(c) Did not impair defendant's vested rights as guaranteed by both the Minnesota and Federal Constitutions.

(d) Did not violate Section 1 of Article IX of the Minnesota Constitution requiring that all taxes be uniform upon the same class of subjects.

(e) Did not place an unreasonable burden on interstate commerce in violation of Section 1 of Article I of the Constitution of the United States.

(f) Did not deprive defendant of the equal protection of the laws under the Minnesota and Federal Constitutions. (*Italics ours.*)

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CHARLES ELMORE GORDLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1939.

No. 222

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,
vs.
STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR REHEARING.

DOHERTY, RUMBLE, BUTLER, SULLIVAN &
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V. W. FOSTER,
E. C. CRAIG,
Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 222.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant,
vs.
STATE OF MINNESOTA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA.

PETITION FOR REHEARING.

Appellant petitions for a rehearing on the following grounds:

I.

The opinion of this court states:

"And certainly if such tax has a fair relation to the property employed in the state (as this tax clearly does), it cannot be said to run afoul of the prohibition against state taxation on interstate commerce."

This conclusion, that the tax has a fair relation to the property employed in the state, is, we respectfully contend, clearly contrary to the undisputed facts disclosed by the record.

The record discloses (R. 144, 152, 154, 165, 170) that the amount of the tax has no appropriate relationship to

(a) either the number of cars a railroad may have in the state nor (b) to the amount of other property in the state. Indeed the chief tax official of the state in charge of this litigation twice testified that there is no relation between the amount of the tax and the amount of the taxable property (R. 20, 21). The opinion disregards this undisputed evidence. The evidence shows that if the Illinois Central had but one railroad tie projecting into the state instead of 30 miles of railroad, its tax would be *increased*! Thus the "fair relation" said by this court to exist is a relationship which produces this result: the less is the total amount of railroad taxable property the greater is the tax!

Nor does the tax have a "fair relation" to the total number of cars a railroad may have in the state. It may have some relationship to the number of cars *on other lines*, but since it is a *unitary property tax*, it must have an appropriate relationship to the *total amount of the property*, including cars, of the taxpayer in the state. Knowledge common to all, ordinary experience and the record itself show that the thirty-seven railroads which pay no tax under the Burlington formula (R. 35, 37) have many times as many cars (as well as many times the track mileage to which alone reference is made in the decision) in the state as has the Illinois Central. To disregard this evidence and assume that it is possible to operate 1,220 miles of railroad (Milwaukee mileage in Minnesota) with fewer cars than are needed on the 30 miles operated by appellant, makes the decision rest on a wholly indefensible ground. If the decision is sound it must be assumed the larger roads are operated without any cars at all since they do not pay any such tax. It is no answer to say that the tax is on the privilege of renting cars, or that it is a tax on cars on other lines, or that it is a tax on the income as such, because the State of

Minnesota declares, as is its right, that the gross earnings tax is a single property tax on a unitary enterprise. It must therefore be tested by its relation to the total amount of taxable property in the state.

The erroneous decision results from the failure of the court to treat this MEASURE of a unitary property tax as the MEASURE of the *total value of all the property in the state*. This court is not free to treat the tax as a tax only on cars on other lines in the state. It is bound to accept the state's contention and construction of the statute (Appellee's Brief, pp. 20, 24) that it is a single tax on a unitary enterprise. It is not a tax on income. It is not a tax on the cars which may be on other roads. The gross earnings tax is a tax on all the property of the railroad in the state and must therefore be in proportion to the amount of all such property. If this fact, unquestionably true, is accepted by this court, the tax can not be sustained. The fact that the tax is a single tax on all the property as a unit, as is specifically admitted by the state, must be ignored if the decision is to stand. Why should this court disregard the state's announcement that it is a single tax on all the property as a unit, and attempt to justify it as a tax on part of the income or part of the property? Is it not because, if the state's interpretation be accepted and it be treated as a single tax on all the property, it can not be sustained, since the tax increases as the *total* amount of *all* the property decreases? This position of the state is clear and unequivocal. The statement of the Attorney General is but a repetition of the holding of the State Supreme Court. This court accepts the state court's construction of the law concerning what they are trying to tax. At least it says so in the last paragraph of the opinion filed:

"But on such matters of construction we defer to the state court's interpretation."

We respectfully submit that it can not be sustained as a tax on a unitary enterprise where the tax increases in amount as the unitary enterprise decreases in size. To hold otherwise is a severe strain on the commonly accepted meaning of the word fair.

II.

It is said in the opinion:

"We have here at most a *recomputation* by the state of taxes payable under a statute which was existent throughout the whole period in question."

This statement ignores Section 2239, Mason's Minnesota Statutes and the formula legally prescribed under it by the Public Examiner. Both statute and formula were existent throughout the whole period in question. It may be admitted that it is a recomputation, but it is a recomputation based on a formula which had no legal existence in 1922-9. And it ignores the valid formula legally adopted under a statute which must also be construed and given effect if the true amount of the tax be correctly determined.

Sec. 2239 provides that the formula must be prescribed by the Public Examiner with the approval of the Tax Commission. A formula was so prescribed. The formula so prescribed under specific legislative authority was followed. Its application in computing the tax was as essential as any other provision of the law. There could be no legal or valid recomputation productive of a result different from that computed in 1922-9, unless Sec. 2239 is ignored.

This court treats the Burlington formula as a part of the law in 1922. It was no part of the law as it existed then. The law then was that the tax must be computed according to the formula legally prescribed pursuant to Sec. 2239. Ignoring this section and substituting the Bur-

lington formula in 1935 is nothing short of an amendment to the statute. Calling it a recomputation can not avoid the fact that it is a recomputation on a basis which had no legal foundation nor legal applicability during the years in question. In short, it is an illegal recomputation.

The Supreme Court of Minnesota evaded this question, apparently because the tax on earnings in 1922-9 can not be sustained, if effect be given to the plain and unmistakable meaning of Sec. 2239. This court is therefore free to adopt its own construction of Sec. 2239. As there is and can be no question about the meaning of this statute (it will scarcely be denied that the legislature granted power to prescribe the formula to the Public Examiner and Tax Commission) we earnestly contend that it should not be ignored.

Conclusion.

Whatever need there may be, as a matter of public policy, to sustain the exercise of a state's taxing power, that question is of no importance here. No attack is made on the right of the state to select gross earnings as the measure of tax liability. There need be no concern about the right of the state to collect such a tax in the future, nor to adopt a new and proper formula for future application.

Reduced to its simplest terms, the sole question is whether appellant owes the state \$26,414.59 for unreported taxes in 1922-9. Our trustfulness in the right to follow the law (under Sec. 2239 the formula followed was an integral part of the law) of the State of Minnesota as it then existed, and our confidence that this court will protect that right, impel us to ask for a reconsideration of the case on these two points. We ask the court to construe the Minnesota statutes (Sec. 2246 *plus* 2239) and

decide whether the company had a right to rely on the formula adopted by that agency of the state authorized by the legislature to act. It was for the legislature and not the court to decide who should prescribe the formula. Everything said in the opinion filed may be sound and still the judgment should be reversed if we are right about this.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 222.—OCTOBER TERM, 1939.

Illinois Central Railroad Company,

Appellant,

vs.

State of Minnesota.

} Appeal from the Supreme
Court of the State of
Minnesota.

[January 29, 1940.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

Minnesota imposes on every railroad company owning or operating lines within its borders a five per cent tax on gross earnings derived from its operation within the state. This tax, payable in lieu of all other taxes,¹ has been sustained by this Court, in various applications, as a property tax.² In this case, which is here on appeal (28 U. S. C. § 344a) from a judgment of the Supreme Court of Minnesota (205 Minn. 1, 621), appellant contends that the statute as construed and applied to it violates the Fourteenth Amendment and the commerce clause of the federal Constitution.

Appellant, an Illinois railroad corporation, owns no lines in Minnesota but operates leased lines with 30.15 miles of trackage in that state.³ It owns or operates about 5,000 miles in other states. The item of gross earnings which the state seeks here to tax arises out of debts and credits for exchange of freight cars which appellant

¹ Sec. 2246, Mason's Minn. Stats. 1927, provides in part:

"Every railroad company owning or operating any line of railroad situated within or partly within this state, shall, during the year 1913 and annually thereafter, pay into the treasury of the state, in lieu of all taxes, upon all property within this state owned or operated for railway purposes, by such company, including equipment, appurtenances, appendages, and franchises thereof, a sum of money equal to five per cent of the gross earnings derived from the operation of such line of railway within this state."

Sec. 2247 defines "gross earnings" as follows:

"The term 'the gross earnings derived from the operation of such line of railway within this state,' as used in section 1 of this act is hereby declared and shall be construed to mean, all earnings on business beginning and ending within the state, and a proportion, based upon the proportion of the mileage within the state to the entire mileage over which such business is done, of earnings on all interstate business passing through, into or out of the state."

² Great Northern Railway Co. v. Minnesota, 278 U. S. 503; Cudahy Packing Co. v. Minnesota, 246 U. S. 450; United States Express Co. v. Minnesota, 223 U. S. 335.

³ These are operated under a 47 year lease beginning July 1, 1904, from the Dubuque and Sioux City Railroad Co.

makes with other railroads, the using road being charged \$1 per day per car. During the years here involved appellant had credits in its favor for such use of its cars by other roads operating in Minnesota of \$17,427,862; and debits owing such roads of \$14,924,506, leaving a net credit balance in favor of appellant of \$2,503,353. These debits and credits represented use of cars in other states as well as in Minnesota. In absence of adequate and accurate records their use was apportioned to Minnesota pursuant to the following formula:

Each reporting road was charged with such percentage of the credit balance owing from each using railroad as was determined by ascertaining the ratio of each using railroad's Minnesota revenue freight car miles to its system car miles.

Each reporting road was given credit for such percentage of the debit balance owing each other road as was determined by ascertaining the ratio of the reporting railroad's Minnesota revenue freight car miles to its system car miles.

The credit and debit balances were computed and apportioned annually; and the net credits were then ascertained, to which the statutory tax of 5 per cent was applied.

Thus for the year 1922 appellant had credit balances of \$691,483.97 owing from 13 other roads. Their Minnesota revenue freight car miles varied from 2.3% to 100% of their system car miles, making Minnesota's proportion of the credit balances \$95,359.49. For the same year appellant had debit balances from freight car hire owing to 8 other roads of \$215,863.05. Appellant's Minnesota revenue freight car miles were only .11% of its system car miles for that year. Hence, it was permitted to deduct only .11% of \$215,863.05 or \$237.43, leaving \$95,122.06 to which the tax was applicable. On similar computations for each of the following seven years the tax for which the state brought suit totalled \$26,414.59.

Appellant's contention under the Fourteenth Amendment is that the statute as applied in the foregoing formula denies it equal protection of the law and due process. We do not think that contention is tenable.

First as to the credit balances. These represent payments to appellant for use of its freight cars by other roads which operate in Minnesota. Minnesota does not seek to reach all of those receipts. As the statute reaches only revenues derived from operations in the state, the formula effects an apportionment. Certainly the ratio of Minnesota revenue freight car miles to system car miles is con-

sistent with the statutory scheme of ascertaining what payments represent use in Minnesota. That the apportionment may not result in mathematical exactitude is certainly not a constitutional defect.⁴ Rough approximation rather than precision is, as a practical matter, the norm in any such tax system.⁵

Second as to the debit balances. As we have said, appellant is not taxed on all of its credit balances but only on that portion which accrues as a result of the use of its cars by others in Minnesota. Hence it is not permitted under the formula to deduct all of its debit balances but only the portion thereof which it pays others for the use of their cars in Minnesota. Certainly if appellant receives \$50,000 from one road for use of appellant's cars in Minnesota and pays another road \$50,000 for appellant's use of that road's cars outside of Minnesota, it cannot realistically be said that no part of the \$50,000 received by appellant has a Minnesota origin. On the contrary, the whole \$50,000 paid appellant derives from use of its cars in Minnesota. For Minnesota then to lay a tax on the whole amount (as it does under this formula) is to exercise a jurisdiction which constitutionally is hers. Similarly to permit under the formula a deduction of only those debit balances owing by virtue of the use by appellant in Minnesota of cars of other roads results in determining a net credit balance for its Minnesota activity of renting out and borrowing freight cars. To hold that that net cannot constitutionally be taxed by Minnesota but must be reduced by the amount of payments made by appellant for its use of cars in other states would be to deprive Minnesota of her jurisdiction over property within her borders.⁶ For as appellant's cars move over tracks of other roads in Minnesota and as cars of other roads move over its tracks in Minnesota, certain credits and debits accrue. To say that the resultant net credit balance does not derive wholly from operations within Minnesota is to deny the fact.

But the nub of appellant's objection seems to rest on the equal protection clause of the Fourteenth Amendment. Most of its contentions come back to the point that it has only 30 odd miles of tracks in the state. On this phase, appellant makes two points. First, as compared with other roads having extensive mileage in Minnesota, it is permitted to deduct only a small fraction (between .1% and .13%) of its debit balances. Second, it is penalized

⁴ *Cf. Rowley v. Chicago & Northwestern Railway Co.*, 293 U. S. 102, 109.

⁵ *Cf. Dane v. Jackson*, 256 U. S. 589, 598-599.

⁶ See *Postal Telegraph Cable Co. v. Adams*, 155 U. S. 689, 696.

for having nominal trackage in Minnesota, for roads with no trackage in the state pay no tax on these items though they may have substantial revenues from rentals of cars for use in Minnesota.

We have in substance already dealt with the first of these contentions. All roads operating in Minnesota are taxed on precisely the same, not on different bases. So far as the present incidence of the statute is concerned, the tax is laid on the net credit balances from the business of renting and borrowing cars used in Minnesota. The fact that appellant receives a larger net than others from its Minnesota activity of renting and borrowing cars and hence must pay a larger tax does not mean that Minnesota has overstepped her constitutional bounds. Appellant is not singled out for special treatment.⁷ It is not taxed on one formula; the others, on another. They are all taxed pursuant to the same formula; and the formula is adapted to ascertainment of value of property situated in Minnesota. And appellant's contention that the tax is discriminatory because it has only 30 miles of track yet must pay a tax, while others with hundreds of miles may pay none, is beside the point. The business taxed is not adequately measured by trackage alone. Though appellant has but few miles of track in the state, nevertheless its cars are constantly moving over other lines in Minnesota. That produces revenue. A tax on that revenue certainly bears a close relationship to appellant's property in the state which no computation based on trackage can alter.

As to appellant's second objection under this head, little need be said. Companies not owning or operating roads within the state are not reached by this tax statute; roads that do, are. That certainly is not discrimination in the constitutional sense. Appellant has subjected itself to the jurisdiction of Minnesota. Those doing likewise are similarly treated by the state, as are domestic companies engaged in that business. The fact that that entails burdens is a part of the price for enjoyment of the privileges which Minnesota extends.⁸

Appellant makes some point of double taxation. But the flaw in that argument is exposed by the familiar doctrine, aptly phrased by Mr. Justice Holmes, that the "Fourteenth Amendment no more for-

⁷ See *Southern Railway Co. v. Watts*, 260 U. S. 519; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89.

⁸ See *Atlantic Refining Co. v. Virginia*, 302 U. S. 22, 31.

bids double taxation that it does doubling the amount of a tax; short of confiscation or proceedings unconstitutional on other grounds."⁹

Appellant's constitutional objection based on the commerce clause has been adequately answered in the prior decisions of this Court sustaining other taxes levied under this statute.¹⁰ The right of a state to tax property, although it is used in interstate commerce, is well settled. And certainly if such tax has a fair relation to the property employed in the state (as this tax clearly does) it cannot be said to run afoul of the prohibition against state taxation on interstate commerce. As Chief Justice Fuller once said on that point, "by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."¹¹

As to appellant's claim of retroactivity, little need be said. We have here at most a mere recomputation by the state of taxes payable under a statute which was existent throughout the whole period in question. Neglect of administrative officials, misunderstanding of the law; lack of adequate machinery have never been constitutional barriers to a state reaching backward for taxes.¹² Hence the case falls far short of types of retroactive tax legislation which have repeatedly been sustained by this Court,¹³ in recognition of the principle that liability for retroactive taxes is "one of the notorious incidents of social life."¹⁴ Certainly where opportunity to be heard is afforded, as here, there can be no complaint for lack of due process of law.¹⁵

In conclusion, appellant contends that the Supreme Court of Minnesota erred in holding that the credits here taxed are "gross earnings" within the meaning of the statute. But on such matters of construction we defer to the state court's interpretation.¹⁶

Affirmed.

⁹ *Ft. Smith Lumber Co. v. Arkansas*, 251 U. S. 532, 533.

¹⁰ *Great Northern Railway Co. v. Minnesota*; *Cudahy Packing Co. v. Minnesota*; and *United States Express Co. v. Minnesota*, *supra* note 2.

¹¹ *Postal Telegraph Cable Co. v. Adams*, *supra* note 6, p. 697.

¹² *Florida Central & Peninsular Railroad Co. v. Reynolds*, 183 U. S. 471; *White River Lumber Co. v. Arkansas*, 279 U. S. 692.

¹³ *Seattle v. Kelleher*, 195 U. S. 351; *Wagner v. Baltimore*, 239 U. S. 207.

¹⁴ *Seattle v. Kelleher*, *supra* note 13, p. 360; *League v. Texas*, 184 U. S. 156.

¹⁵ *Kentucky Union Co. v. Kentucky*, 219 U. S. 140, 154.

¹⁶ *Chicago Theological Seminary v. Illinois*, 188 U. S. 662, 674; *Storaasli v. Minnesota*, 283 U. S. 57, 62.